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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

Appellate Docket No. 73-7006

JAMES P. LEE, JR. and
RONALD RICH,
Appellants.

vs.

WILLIAM THORNTON,
District Director of
United States Customs for
the District of Vermont;
VERNON D. ACREE,
United States Commissioner
of Customs;
WILLIAM E. SIMON,
United States Secretary
of the Treasury; and
THE UNITED STATES OF
AMERICA,
Appellees

On Appeal From the United States District Court

For The District of Vermont

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JURISDICTIONAL STATEMENT

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I. Jurisdiction

A. Nature of Appeal

This appeal is taken by plaintiffs below, James P. Lee and Ronald Rich, from the order of a three-judge United States District Court for the District of Vermont entered April 10, 1974 pursuant to the court's opinion filed January 28, 1974.

B. Opinion Below

The opinion and order of the District Court are not yet published in Federal Supplement but are attached hereto as Appendix A and B, respectively.

C. Jurisdiction

This appeal is taken pursuant to 28 U.S.C. 1253, which authorizes appeals from an order granting or denying injunctive relief in an action required to be heard by a three-judge court. The case was heard by a three-judge court below, pursuant to 28 U.S.C. §2282. In the district court, appellants sought to enjoin the operating of 19 U.S.C. §§1460 and 1595a and 21 U.S.C. §881 on grounds that these statutes, which provide for personal penalties and for forfeiture of vehicles and other property used to violate customs and drug laws, denied appellants procedural safeguards required by the fourth, fifth, and sixth amendments

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seizure) and 2201 (declaratory judgment).

The District Court partially enjoined the operation of the statutes in question, as more fully described below, but refused to require that a hearing be granted in all cases without bond, at which the Government must prove the correctness of forfeiture or assessment of penalties by a preponderance of the evidence. The court also refused to order the restoration of the penalties paid by appellants. From the denial of these requests for an injunction, this appeal follows.

The judgment sought to be reviewed was entered April 10, 1974. Appellant's notice of appeal was filed May 7, 1974 in the United States District Court for the District of Vermont. A copy of the Notice of Appeal is attached hereto as Appendix C.

28 U.S.C. § 2403 applies to this case. The court below did not draw this case to the attention of the Attorney General, but the United States was a party and was represented by the United States Attorney for the District of Vermont.

The statutory provision believed to confer jurisdiction on this court is 28 U.S.C. § 1253.

Cases believed to sustain the jurisdiction are Calero- Toledo v. Pearson Yacht Leasing Co., 42 U.S.L.W. 4693 (U.S. May 15, 1974); see also Melendez v. Shultz, 486 F.2d 1032 (1st Cir. 1973). These cases dealing with forfeitures, differ from the instant case only because

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D. Statutes Involved

Appellants seek to enjoin the operation of 19 U.S.C. § 1460 (providing for forfeitures and personal penalties

where the operator of a vehicle fails to stop at a border checkpoint), 19 U.S.C. §1595a (providing for forfeiture of vehicles used to import goods illegally); and 21 U.S.C. § 881 (providing for forfeiture of vehicles used to transport regulated drugs illegally). Because of their length, the text of these statutes appears at Appendix D, infra.

Appellants also challenge the validity of 19 U.S.C. §§1608 & 1615. These statutes specify the procedures by which hearings may be obtained to determine the correctness of a forfeiture of goods under the statutes cited above. The text of 19 U.S.C. §§ 1608 & 1615 reads as follows:

[19 U.S.C.] § 1608. Same; claims; judicial condemnation

Any person claiming such vessel, vehicle, merchan- or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

[19 U.S.C.]§ 1615. Burden of proof in forfeiture proceeding

In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: Provided, That probable cause shall be first shown for the institution of

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(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying mechandise sic or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.

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II. Questions presented

A. Does the imposition of a personal penalty for violation of the customs laws, without any opportunity for a hearing on the merits, violate the due process clause of the fifth amendment?

B. Does the requirement that claimants of property allegedly subject to forfeiture bear the burden of proving that no violation of customs laws occurred violate the due process clause of the fifth amendment?

C. Does the requirement that claimants of property allegedly subject to forfeiture post a penal bond in the amount of $250 to secure a judicial hearing violate the due process clause of the fifth amendment?

III. STATEMENT OF THE CASE

A. Appellant Ronald Rich

Ronald Rich, a resident of St. Albans, Vermont, was stopped together with his wife and two children on October 27, 1971 by a border agent in the vicinity of Swanton, Vermont. They were accused orally of having crossed the border illegally, without reporting at a checkpoint. The border agent then directed Rich to proceed to a border station, which he did. There plaintiff was informed by a customs inspector that

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III. STATEMENT OF THE CASE

A. Appellant Ronald Rich

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This statute, which is reproduced at Appendix D, infra, requires persons in charge of vehicles to report to the nearest customs house for inspection. A companion statute, 19 U.S.C. § 1460, subjects the person in charge of

the vehicle to a personal penalty of $100 for violation of 19 U.S.C. § 1459. Additionally, if the vehicle carries passengers at the time of the violation, the person in charge of the vehicle is liable to a penalty of $500 per passenger. The potential penalty to which Rich was allegedly subject under this statute was therefore $1600. Although neither statute provides for seizure of vehicles, 19 U.S.C. § 1594 authorizes customs officers to hold vehicles to secure payment of penalties, and it is the practice of the Customs Department to use this power.

Rich was also advised orally that he could immediately file a petition for remission and mitigation of penalties under 19 U.S.C. § 1618. The customs inspector at the border station had been delegated authority by defendant William Thornton, the District Director of Customs, to process such applications on the spot. Rich filled out the application and the customs inspector informed him that a deposit of $50.00 would serve to release his car. Rich made the deposit in cash and left.

On January 6, 1972 Rich received written notice from Defendant Thornton of the penalties incurred, and on January 14, 1972 Thornton notified Rich by letter that the penalty had been mitigated to $25.00 since there was no evidence that dutiable merchandise had been in the car at the time of entry. Defendant also stated that the sum of $25.00 would be deducted from the $50.00 deposit and the remainder returned in due course.

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On January 6, 1972 Rich received written notice from Defendant Thornton of the penalties incurred, and on January 14, 1972 Thornton notified Rich by letter that the penalty had been mitigated to $25.00 since there was no evidence that dutiable merchandise had been in the car at the time of entry. Defendant also stated that the sum of $25.00 would be deducted from the $50.00 deposit and the remainder returned in due course.

Rich had no opportunity for a hearing on whether he had in fact failed to report to a customs station or, as he asserted, was en route to such a station at the time of his apprehension. Moreover, there is no statutory or regulatory procedure of any kind which permits a person

allegedly subject to these penalties to secure a hearing at which the Government must prove by a preponderance of the evidence that the violation in fact occurred.

B. Appellant James Lee

Plaintiff James Lee, traveling with a friend and two hitchhikers, crossed the border between Canada and the United States in the early morning of October 5, 1971. Shortly thereafter they were apprehended by border patrol officers who accused them of having crossed the border without proceeding to the nearest customs station. The Volkswagen van in which the quartet was traveling belonged to Lee, but his friend was driving at the time of the crossing while Lee slept in the back. The friend stated that he intended to proceed to the nearest checkpoint after obtaining more gasoline at his father's home; this explanation was rejected.

Customs officials searched Lee's van and its passengers and discovered several items of foreign manufacture--a camera, tape deck, and scales--and, allegedly, one gram of marijuana. Lee and his companions were told that they were free to go but that the van and its contents were being detained. Defendant Thornton subsequently informed Lee that his van and other belongings were subject to forfeiture because of violations of 19 U.S.C. § 1459 and 1595a and 21 U.S.C. § 881. Thornton also stated that Lee could petition for remission and mitigation and demonstrate that the items of foreign manufacture were purchased

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Customs officials searched Lee's van and its passengers and discovered several items of foreign manufacture--a camera, tape deck, and scales--and, allegedly, one gram of marijuana. Lee and his companions were told that they were free to go but that the van and its contents were being detained. Defendant Thornton subsequently informed Lee that his van and other belongings were subject to forfeiture because of violations of 19 U.S.C. § 1459 and 1595a and 21 U.S.C. § 881. Thornton also stated that Lee could petition for remission and mitigation and demonstrate that the items of foreign manufacture were purchased domestically.

19 U.S.C. §§ 1459 and 1460, the same statutes which were applied to appellant Rich, also provide that vehicles used to import goods into the country illegally, as well as

the goods themselves, are subject to forfeiture. This forfeiture is in addition to the personal penalties described above in connection with plaintiff Rich. Because Lee's van contained goods of foreign manufacture, and allegedly a small amount of marijuana, the forfeiture provisions were found applicable by defendant Thornton.

The other two statutes applied to Lee, 19 U.S.C. §§ 1595a and 21 U.S.C. § 881, also provide for forfeitures. Section 1595a provides for forfeiture of any vehicle used to bring goods into the country illegally. Section 881 provides for the forfeiture of any vehicle used to transport regulated drugs.

Lee was therefore, subject to a personal penalty of $1840-the base penalty of $100 plus $500 apiece for each of three passengers, plus $240 for the value of the goods of foreign manufacture in the van. In addition, those goods and the Volkswagen van were subject to forfeiture.

Approximately three weeks after the van was initially seized, Lee assembled proof-of-purchase documents necessary to demonstrate the domestic origin of his belongings and submitted these, together with his petition for remission and mitigation, to defendant Thornton. On November 1, Thornton waived the forfeiture and reduced the penalty to $100. Defendant Thornton stated his rationale for imposing the penalty as follows: "In view of the fact that the vehicle was found being used to transport marijuana." Lee forthwith paid the fine and reclaimed his property.

At no time was Lee afforded a hearing at which the

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At no time was Lee afforded a hearing at which the existence of marijuana would be established. Moreover, the Government never held a hearing to demonstrate that the van did bypass a checkpoint, contrary to the allegations of Lee and his friend that they were en route to a check-

point at the time of apprehension. Lee could have obtained a judicial hearing, as described below, but he was unable to post a mandatory $250 cost bond because of his indigency.

As in Rich's Case, there is no provision for a hearing in which Lee could have challenged his liability for personal penalties. With regard to forfeitures, however, a hearing is provided for in 19 U.S.C. § 1608. When property allegedly subject to forfeiture is seized, the district director of customs has it appraised. 19 U.S.C. §§ 1606-07. If it is worth more that $2500, judicial proceedings must be instituted by the United States Attorney to forfeit the property. 19 U.S.C. § 1610. If the value of the property is less than $2500, the district director must initiate summary sale proceedings to dispose of the property. 19 U.S.C. § 1607; 19 C.F.R. § 162.46. A claimant of property subject to forfeiture may petition for remission and mitigation. 19 U.S.C. § 1618. If, however, he wishes to challenge the liability of the goods to forfeiture, he must file a claim for the property together with a $250 penal bond. On receipt of the claim and bond, the United States Attorney must bring a condemnation action in the United States District Court. The burden of proof in such a proceeding is on the person challenging the forfeiture. 19 U.S.C. § 1615.

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C. Proceedings Below

Plaintiff Lee brought his action in the United States

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C. Proceedings Below

Plaintiff Lee brought his action in the United States District Court on November 24, 1971; Rich brought his action on October 31, 1972. Both complaints alleged that the assessment of mitigated penalties in the prescribed fashion denied them constitutionally-mandated probable cause hearing as well as a hearing on the merits of the seizure and the

assessment of penalties or forfeitures. Plaintiffs claimed both the procedural protections of the criminally accused under the fourth and sixth amendments and the due process protections afforded by the fifth amendment.

The two cases were consolidated and were heard by the three-judge court on March 6, 1973. On January 22, 1974 the court issued its opinion, holding that plaintiffs were entitled to an immediate hearing to determine whether there was probable cause to believe that seized property was indeed subject to forfeiture or was subject to being held as security for the payment of penalties. The opinion also required a speedy mitigation or remission determination or, alternatively, the setting of a bond in the amount of the maximum penalty likely in light of the remission and mitigation petition. Upon posting of a bond, the claimant would receive back the vehicle or other goods seized.

If the petition for remission and mitigation is not acted upon immediately, the claimant is entitled to a further hearing within three business days after the seizure, at which he may testify but apparently may not confront adverse witnesses, before the customs officer who will determine remission and mitigation. The petition must be acted upon at the conclusion of the hearing.

Although the opinion below does require hearings on probable cause and remission or mitigation, the court rejected plaintiffs' claim to a hearing on the basis for the seizure or penalty. The court specifically ruled that plaintiffs'

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Although the opinion below does require hearings on probable cause and remission or mitigation, the court rejected plaintiffs' claim to a hearing on the basis for the seizure or penalty. The court specifically ruled that plaintiffs' access to the United States District Court under 19 U.S.C. § 1608, satisfied due process requirements. [1]

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1. As described in detail under Part III (B)-Argument, there is no access to the Court for contest of a personal penalty. 19 U.S.C. § 1608 applies only to forfeiture proceedings.

In doing so, it rejected plaintiff's' claim that the mandatory cost bond is unconstitutional as applied to indigents. Although the question of burden of proof was briefed and argued, the court did not isolate this issue but, instead, broadly held that the procedures afforded by 19 U.S.C. §§ 1607-08 were adequate.[2] The court did hold that the forfeiture proceedings were not essentially criminal in nature under the sixth amendment.[3]

On April 10, 1974, the court issued its order implementing the opinion. The order enjoins enforcement of the forfeiture statutes in question unless procedures are instituted complying with the opinion. The order denies remission of the penalties paid by both plaintiffs. The appeal to this court was filed by plaintiff May 7, 1974.

IV. Argument

A. This Case Raises Important Constitutional Issues, Previously Unresolved

The questions raised by this appeal have never been decided by this Court. In Calero-Toledo v. Pearson Yacht Leasing Co., 42 U.S.L.W. 4693 (U.S. May 15, 1974) the Court denied claims that pre-seizure hearings are constitutionally required in forfeiture cases and that property of innocent owners may not be forfeited under the fifth amendment's prohibition against taking without just compensation. Neither that case, nor any other Supreme Court decision, has ruled upon the post-forfeiture and personal penalty procedures. One

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2. This holding applied both to Rich and Lee although Rich paid only a personal penalty and, therefore, was not covered by 19 U.S.C. §§1607-08.
3. Plaintiffs argument that they are entitled to the full safe guards and procedures of a criminal trial is not being persued in this appeal

Procedures similar to those involved in this case are prescribed by statute for a substantial number of other federal and state forfeiture laws.[4] Because these wide-spread procedures are presently in legal doubt, a ruling upon them by this Court is essential.

B. The Imposition of Personal Penalties Without Opportunity for a Hearing on the Merits Violates the Due Process Clause of the Fifth Amendment

Both appellants in this case were subjected to personal penalties under 19 U.S.C. § 1460. The mitigated penalty paid by Rich was based solely on the personal penalty provisions; the penalty paid by Lee was apparently an undifferentiated penalty based upon both the personal penalty provisions and the forfeiture provisions. There is no mechanism either in the statute or in departmental regulations for appellants to obtain a hearing. The court below erred in stating that the provisions of 19 U.S.C. §§ 1607-08, which provide hearings only to claimants of forfeited property, applied to appellant Rich or to the personal penalties assessed against Lee. A hearing on remission and mitigation does not adequately substitute for a hearing on the merits, inasmuch as procedure has been consistently termed by the courts a matter of administrative grace applied to an individual whose underlying liabil it is already presumed. See, e.g., Menkarell v. Bureau of Narcotics, 463 F 2d 88, 93 (3d

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4. See, e.g., 26 U.S.C. §§ 5607-15 (Internal Revenue Code); 21 U.S.C. §334 (Federal Food, Drug and Cosmetic Act); 22 Ala. Code § 258 (57) (Supp. 1973) (Uniform Controlled Substances Act); 56 1/2 Ill. Stat. Ann. §§ 1505-07 Smith Hurd 1973); Kans. Stat. Ann. §§ 65-4135 to 4138 (Supp. 1973); Md. Code Ann., Act 27 § 297 (Supp. 1973); Minn Stat. Ann., §152-119 (Supp. 1973); 24 N.J. Stat. Ann § 21-35 (Supp. 1973); 63 Okl. Stat. Ann. §§ 2-503 to -511 (Supp. 1973); Wash. Rev. Code Ann. § 69.50.55 Supp. 1973).

A hearing is the most elementary requirement of due process where the Government takes individual property. As this Court has repeatedly stated: "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). And as the Court stated in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950),

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case.

See also Fuentes v. Shevin, 407 U.S. 67, 82 (1972). Even in cases involving the taxing power, where more summary procedures sometimes apply to governmental takings, an opportunity for hearing must be afforded before tax liability can be finally established. See, e.g., Covey v. Somers, 351 U.S. 141 (1956); Turner v. Wade, 254 U.S. 64 (1920).

The court below recognized the necessity for a hearing on the merits by mandating a probable cause hearing. However, a preliminary hearing is a precursor of, not a substitute for, a hearing on the merits. See Morrissey v. Brewer, 408 U.S. 471, 487-8 (1972). The lower court erred in not enjoining the imposition of personal penalties without a hearing.

C. The Requirement that Claimants of Property Allegedly Subject to Forfeiture Must Bear the Burden of Proving that No Violation Occurred is Unconstitutional Under the Fifth Amendment

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C. The Requirement that Claimants of Property Allegedly Subject to Forfeiture Must Bear the Burden of Proving that No Violation Occurred is Unconstitutional Under the Fifth Amendment

19 U.S.C. § 1615 requires that in all cases where a judicial proceeding is brought to condemn forfeited property, the burden of proof rests upon the claimant of such property. Under the controlling cases from this Court, this statute is clearly unconstitutional. [5]

---

5. A nearly identical state statute was struck down in Fell v. Armour, 355 F. Supp. 1319, 1329-31 (M.D. Tenn. 1972) because the burden of proof was imposed upon the claimant.

In Speiser v. Randall, 357 U.S. 513 (1958) this Court held unconstitutional a state statute which required taxpayers seeking a veterans exemption to prove that they did not advocate the overthrow of the government. The Court held that the fourteenth amendment's due process clause forbids such a placement of the burden of proof in an area affecting free speech. In reaching this conclusion, the Court implied that the burden of proof may not be placed upon the individual liable to penalties in either a criminal or quasi-criminal proceeding:

> It is, of course, familiar practice in the administration of a tax program for the taxpayer to carry the burden of introducing evidence to rebut the determination of the collector. [citations omitted]. But while the fairness of placing the burden of proof on the taxpayer in most circumstances is recognized, this Court has not hesitated to declare a summary tax-collection procedure a violation of due process when the purported tax is shown to be in reality a penalty for a crime. Lipke v. Lederer, 259 U.S. 557; cf. Helwig v. United States, 188 U.S. 605. The underlying rationale of these cases is that where a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue. Similarly it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate when applied to penalize speech.

357 U.S. at 524-25. The forfeiture statute applied to appellant Lee imposes a quasi-criminal penalty to which the above language applies. Forfeitures and penalties are so regarded whenever the penalty is limited in application to persons "who are significantly involved in a criminal enterprise." Calero-Toledo v. Pearson Yacht Leasing Co., 42 U.S.L.W. 4693 (U.S. May 15, 1974), quoting United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971).

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This case involves the same remission and mitigation statute 19 U.S.C. § 1618 as United States Coin & Currency. Clearly the remission and mitigation process as applied to plaintiff Lee resulted in a $100 penalty because the customs officer believed that he was significantly involved in a criminal enterprise. The reason given for assessing the penalty was "In view of the fact that the vehicle was found being used to transport marijuana."[6]

This case, therefore, like United States Coin & Currency necessarily involves a forfeiture proceeding which has been described as quasi-criminal. The implications of this label vary depending upon the procedural protection sought. While the Government meed not prove its case beyond a reasonable doubt [7] or provide for confrontation of all adverse witnesses [8] or avoid strictly collateral estoppel or double jeopardy,[9] the claimant of property is protected against self-incrimination [10] and unreasonable search and seizure. [11]

The thrust of precedent places the burden of proof within the ambit of constitutional stricture in a quasi-criminal proceeding. See Speiser v. Randell, 357 U.S. 513, 523 (1958); Lipke v. Lederer, 259 U.S. 557 (1922). Based on these precedents, recent lower courts decisions, have held unconstitutional the placement of burden of proof on claimants in forfeiture proceedings. In McClendon v. Rosetti, 460 F.2d III (2d Cir 1972), the court considered an ordinance that permitted the Police Property Clerk to hold property taken from arrested persons which was, inter

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6. 21 U.S.C. §841 and 18 U.S.C. §545 both make import of a regulated drug, without declaration, a crime.
7. United States v. Regan, 232 U.S. 37 (1914).
8. United States v. Zucker, 161 U.S. 475 ( ).
9. One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972), but see Coffey v. United States, 116 U.S. 436 (1886).
10. Boyd v. United States, 116 U.S. 616, 634 (1886)
11. One Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

The claimant had the burden of proving his right to reobtain the property in a civil action. The Second Circuit Court of Appeals found the procedure unconstitutional because the claimant's property could be taken and held without any showing by the city of a violation of law. See also McClendon v. Rosetti, 369 F. Supp. 1391 (S.D.N.Y. 1974) (on remand); Fell v. Armour, 355 F. Supp. 1319 (M.D. Tenn 1972).

There is an additional compelling reason requiring the government to bear the burden of proof in a forfeiture situation. The right against self-incrimination - which this Court has consistently held to apply in forfeiture proceedings - would be meaningless if the claimant bore the burden of proof. See United States v. United States Coin & Currency, 401 U.S. 715 (1971). This fact was recognized in Iannelli v. Long, 333 F. Supp. 407 (W.D. Pa. 1971) which involved a tax assessment:

> In order to prevail on a suit for refund, the burden of establishing the correct tax due is upon the taxpayer. The Iannellis, therefore, would be required to prove facts about their operations and income which might directly incriminate them both in the pending federal court suit and perhaps also in a state court action.
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> To the plaintiffs, therefore, the choice seems to be simple. They either waive their right to be silent under the Fifth Amendment of the Constitution in connection with the criminal case or they must forfeit all of their property down to and including the furniture in their home.

333 F. Supp. at 410. As long ago as 1886, in this context, this Court cautioned that "illegitimate and unconstitutional practices get their first footing... by silent approaches and slight deviations from legal

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D. The Requirement of a $250 Cost Bond Violates Appellants' Fifth Amendment Right to Due Process of Law and Equal Protection of Law

The record reflects that Lee was unable because of poverty to post the $250 cost bond as required by 19 U.S.C. § 1618 in order to obtain a hearing, even one in which Lee had the burden of proof. Consequently, his opportunity to be heard was completely foreclosed.

The right to be heard "must be protected against denial by particular laws that operate to jeopardize it for particular individuals." Boddie v. Connecticutt, 401 U.S. 371, 379-80 (1971). Where a party has only one effective forum to settle his dispute-in this case a judicial forum - access to that forum cannot be denied because of indigency. I8d. The application of this principle to the instant case is self-evident. As stated in Fell v. Armour, 355 F. Supp. 1333 [12] (M.D. Tenn. 1972):

> The $250 cost bond of the Act allows one sufficiently affluent to obtain a hearing whereby he may seek recovery of his vehicle and avoid the harsh penalty of forfeiture. Those owners of seized vehicles who cannot afford the cost bond have their rights to seek recovery of the vehicle and thereby avoid the harsh penalty of forfeiture extinguished by their personal poverty. As to these indigent owners, the effect of the $250 cost bond requirement is to grant to the seizing police officer the effective right to extinguish all property interests.
>
> As to those too poor to afford a hearing, this exercise of raw power can only lead to arbitrary state action in that no neutral hearing officer or judicial official will have the opportunity to review the evidence and determine the propriety of the forfeiture or the claim for recovery. Thus, the indigent owner may be deprived of property without due process of law in that the deprivation may occur without any process whatsoever.

The Court below attempted to avoid this settled principle by citing United States v. Kras, 409 U.S. 434

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The Court below attempted to avoid this settled principle by citing United States v. Kras, 409 U.S. 434 (1973). In Kras, however, this Court found that access to a bankruptcy court was not essential because of the property interests involved - compared to the marriage

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12. Appellant Lee does not content that after the property in question has been shown to be subject to forfeiture, the Government must negate the statutory exemptions under 19 U.S.C. §1618. Appellant has the burden to show he acted without fault or wilfull negligence under this section.

interest in Boddie - and because "bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors." By contrast, plaintiff Lee's right to his vehicle and his consequent right to travel do involve a highly important interest. More important, the judicial hearing provided by 19 U.S.C. § 1608 is the sole method available to a person to adjudicate his right to his property and reclaim it.

The court below raised an additional justification for the cost bond - it safeguards the government "from the prosecution of frivolous claims." This court has specifically rejected this justification in a comparable context. In Lindsay v. Normet, 405 U.S. 56, 78 (1972) the Court struck down a double bond requirement for appeals in landlord-tenant cases noting:

> The claim that the double bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond.

Indeed, the irrationality of the bond is more extreme in this case because plaintiff has be deprived of any hearing whereas the plaintiffs in Lindsay lost only an appeal.

Appellant Lee also submits that, apart from the wealth barrier presented by the bond, the requirement does not meet the stricture of equal protection. A cost bond is required only when the property seized is worth less than $2500. The distinction based on value of goods is irrational and serves no governmental purpose except to deprive claimants of a hearing. The amount of bond

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not charge others without a rational destinction. The rationale of Rinaldi applies equally to the bond requirement in issue here.

V. Conclusion

For the reasons expressed herein, appellants contend that the questions presented by this appeal are substantial and of great public importance. Appellants urge that probable jurisdiction be noted.

Respectfully submitted,

Dated: July 2, 1974

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

James P. Lee, Jr.

Civil Action

v.

File No. 6451

William L. Thornton, District Director of Customs, Myles J. Ambrose, Commissioner of Customs, John Connally, Secretary of the Treasury

Ronald Rich

Civil Action

v.

File No. 6762

William L. Thornton, District Director of Customs, Vernon D. Acree, Commissioner of Customs, George P. Shultz, Secretary of the Treasury

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OPINION and ORDER

The relevant facts have been stipulated by the parties. On October 4, 1971, plaintiff Lee's 1966 Volkswagen van was observed by a Border Patrol agent to be crossing into the United States from Canada at Alburg Springs, Vermont, although the customs station at Alburg Springs was closed. Agent Peck, who observed the crossing, followed the vehicle, driven at that time by an acquaintance of Lee, to a point in East Alburg, Vermont, where the vehicle was stopped. Lee told Peck that he had not gone to the immigration and

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Canadian national, to Swanton Immigration Headquarters.

After a search of the van in Swanton, Lee was informed by customs agents that they had found several items of foreign manufacture with no proof of domestic purchase, plus two clip scales and one gram of marijuana seeds; that Lee and the others were free to leave; but that the van and personal property had been seized and would be held by the officials. Lee had no opportunity to challenge the seizure of the van at that time.

On the next day, October 5, 1971, Lee contacted defendant Thornton, the District Director of the Bureau of Customs, concerning the release of the property and was told that a cash deposit in the sum of $1,800 would be required to secure release of the van. On October 19, 1971, the Director advised Lee that, having been charged with violations of 19 U.S.C. § 1459, 19 U.S.C. § 1595a and 21 U.S.C. § 881, he was assessed a penalty of $1,845.00 and that the van and personal property therein were subject to forfeiture as an additional penalty. The letter also advised Lee of his right to file a petition for "mitigation and remission" under 19 U.S.C. § 1618. Lee filed that petition on October 27, 1971, in which he set forth his version of the circumstances surrounding the events of October 4. On

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post a $250 bond to force the Government to institute a libel of forfeiture under 19 U.S.C. § 1608, Lee paid the $100 and secured the release of the van.

Plaintiff Rich, his wife and two minor children crossed the border from Canada into the United States via the Wolfridge road in Alburg, Vermont, on October 27, 1971, and did not pass through a customs station. Under observation by a Border Patrol agent, Rich's automobile was stopped in the vicinity of Swanton, Vermont. Rich was accused by the agent of having crossed the border illegally and was directed to proceed to the border station at Highgate, Vermont. At the Highgate station, the automobile was searched and seized, and Rich was advised of the nature of the charge against him under 19 U.S.C. § 1459 and the statutory penalty that could be assessed under 19 U.S.C. § 1460. Like Lee, he was informed that he could file an immediate petition for remission and mitigation of penalties pursuant to 19 U.S.C. § 1618. Rich filed a petition at that time and was told by Customs Inspector Clark that a cash deposit of $50 "toward the ultimate mitigated penalty" would secure the release of the automobile under 19 U.S.C. § 1614.[1/] Rich paid the deposit and the automobile was released. On January 6, 1972, Rich received a "Notice of Penalty Incurred and Demand for Payment" (Customs Form

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1972, Thornton notified Rich by letter that the penalty had been mitigated to $25 and that this penalty would be deducted from his $50 deposit, the balance owed to be returned in due course. The discussion with Inspector Clark was the only opportunity given to Rich during the course of events to state his version of the facts in person.

I. PLAINTIFFS' CLAIMS.

On motion, plaintiffs' complaints challenging the constitutionality, both facially and as applied, of the statutory provisions of the United States Code under which their property had been seized and penalties assessed, were consolidated for hearing before a three-judge district court convened pursuant to 28 U.S.C. § 2282. More specifically, plaintiff Rich alleged that the fourth amendment required a probable cause hearing prior to the search and seizure of his automobile, that the fifth amendment was violated by his being required to post a bond to secure the release of his vehicle without a prior hearing, and that the procedures mandated by the United States Code to effect forfeiture and remission or mitigation of penalties imposed upon him violated both his fifth amendment right to due process and various rights guaranteed by the sixth amendment. He asks this court to declare 19 U.S.C. §§

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$2,000 and the setting aside of the District Director's final assessment of the $25 fine and a concomitant remission of that $25 to him.

Plaintiff Lee likewise contends that the seizure and holding of his property violated his fifth amendment right to due process and that the forfeitures and penalties were imposed by procedures that violated his rights as guaranteed under the fourth, fifth and sixth amendments. Jurisdiction is invoked by both plaintiffs under 28 U.S.C. §§ 1346(a)(2), 1337, 1355, 1356 & 1361. We conclude that we have jurisdiction under 28 U.S.C. § 1346(a)(2) to review the constitutionality of the challenged statutes. Melendez v. Shultz, 356 F. Supp. 1205, 1208 (D. Mass. 1973) (three-judge court).

We hold first that both plaintiffs Rich and Lee have standing to attack the constitutionality of the procedures under which their property was seized and their fines assessed, even though it is stipulated that neither plaintiff exhausted his administrative remedies under the pertinent statutes and even though plaintiffs' property has been returned and the time period in which administrative remedies might be sought has passed. It would serve no purpose to require plaintiffs to exhaust remedies "the alleged inadequacy and untimeliness of which are cornerstones .... " of their claims. Id. Cf. Gibson v. Berryhill, [illegible]. See also Oesterreich v. Selective

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payments of the respective fines as mooting the otherwise substantial constitutional claims asserted by plaintiffs. Cf. Ward v. Love County, 253 U.S. 17 (1920).

II. BASIC INTERESTS INVOLVED.

We commence with recognition of the great importance to be attached to the governmental interests here at stake. We deal here directly with statutes and regulations that permit the Government to regulate the entry of foreign nationals and dangerous substances into the United States and to exercise its right to collect duty on merchandise imported into the country. No one doubts the Government's power to exclude aliens from the country, Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889), or that the power to do so, or to collect duties, can be exercised through routine inspection of individuals or conveyances seeking to cross the borders. Carroll v. United States, 267 U.S. 132, 154 (1925).

The Supreme Court has recently reaffirmed Carroll while applying its rationale to the question whether warrantless searches of vehicles traveling on a road no closer than 20 miles to the Mexican border were violative of the fourth amendment's proscription of "unreasonable searches and seizures." Almeida-Sanchez v. United States, 413 U.S. 266 (1973). The Almeida-Sanchez decision crystallized

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> It is not enough to argue, as does the Government, that the problem of deterring unlawful

> entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

Id. at 273. It is abundantly clear that the Government's interest in controlling the flow of drugs or collecting duty on otherwise importable goods is of at least equal magnitude to the interest in deterring unlawful entry by aliens. Against these interests we must balance those constitutional protections invoked by plaintiffs.

III. VALIDITY OF BORDER SEARCHES AND SEIZURES.

The validity of the searches conducted by customs agents in these cases clearly did not contravene the fourth amendment. Both vehicles were observed crossing the border at either a closed border station or at a point where no border station existed. The existence of probable cause to search the persons or the vehicles themselves, therefore, is not subject to serious dispute. Plaintiff Rich's automobile was searched at a border station, as was Lee's van. These searches are well within the language of Carroll v. United States, supra. In these circumstances, the search of Lee's van, which occurred away from the border, must be

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Probable cause to seize both vehicles for the purpose

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of taking them into custody is established for reasons identical to those applicable to the searches conducted. Cf. Cooper v. California, 386 U.S. 58 (1967). We conclude that whether it was proper to retain the two vehicles beyond the period required to search them is a question properly disposed of under the Due Process Clause of the fifth amendment.[2/]

IV. DUE PROCESS CLAIMS.

Plaintiffs' fifth amendment claims fall generally into two categories: (1) that the seizure and retention of the vehicles or the holding of a deposit on them without a sufficient opportunity to be heard in opposition thereto violated their right not to be deprived, even temporarily, of their property without due process of law; and (2) the procedures established for mitigation and remission of penalties as well as for forfeiture are likewise deficient.

A. Rich's Due Process Claim.

An examination of Rich's claim under the Due Process Clause must necessarily begin with an inspection of the statutes under which the Government claims authority to seize, hold, or release a vehicle after payment of a deposit. These include 19 U.S.C. § 1459, which imposes upon the person in charge of any vehicle arriving in the United States from

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> [T]he person in charge of any vehicle who fails to report arrival in the United States as required by section 1459 ... shall be subject to a penalty of $100 for each offense. If any merchandise is imported ... in any vessel or vehicle ... from a contiguous country, which vessel, vehicle or merchandise is not so reported to the proper customs officers ... , such merchandise and the vessel or vehicle, if any, in which it was imported ... shall be subject to forfeiture; and ... the person in charge of such vehicle ... shall, in addition to any other penalty, be liable to a penalty equal to the value of the merchandise which was not reported .... If any ... vehicle not so reported carries any passenger ... the person in charge of the vehicle shall, in addition to any other penalty, be liable to a penalty of $500 for each passenger so carried, discharged or landed.

Under § 1460 the customs officials had no statutory authority to retain Rich's automobile since the sole allegation against Rich was a simple violation of § 1459. The subordinate clause "If any merchandise is imported" conditions the remainder of that particular sentence; in other words, if no merchandise subject to duty is imported, there can be no seizure or forfeiture under § 1460. This reading is enforced by the subsequent sentence of the section, which limits additional penalties to the value of the "merchandise which was not reported." Indeed, the Government stipulates this to be the correct reading of § 1460, arguing that the vehicle was seized and held pursuant to 19 U.S.C. § 1594.

Under 19 U.S.C. § 1594, a vehicle whose driver "has

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Under 19 U.S.C. § 1594, a vehicle whose driver "has become subject to a penalty for violation of the customs-revenue laws of the United States ... shall be held for the payment of such penalty and may be proceeded against

summarily by libel to recover the same .... "[3] While the legislative history of § 1594 is silent on the question whether Congress intended a simple failure to report under § 1459 to expose a vehicle to retention to secure the Government's interest in collecting whatever penalty might be assessed, the broad language of § 1594 would appear to permit such a reading.[4] Assuming such a reading to be correct, we shall turn to a finer reading of the phrase "has become subject to a penalty" after a brief discussion of the fifth amendment implications of this type of seizure.[5]

More than a century ago the Supreme Court wrote that "Parties whose rights are to be affected are entitled to be heard .... " Baldwin v. Hale, 68 U.S. 223, 233 (1863). In recent years, the Court has, proceeding from this premise, developed a body of constitutional doctrine deeply relevant. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), held that notice and a prior hearing were mandated before a statute authorizing the prejudgment garnishment of wages could pass muster. The Court's opinion noted that wages were a "specialized" form of property without elaborating on the precise effect of such a categorization. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court, holding that notice and a prior hearing were required before welfare benefits could be terminated, likened welfare

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of the Georgia Motor Vehicle Responsibility Act that permitted the summary suspension of the motor vehicle registration and driver's license of an uninsured motorist involved in an accident unless that motorist posted security to cover the amount of damages claimed by any aggrieved party. Id. at 536. The Court commented, as it had in Sniadach and Goldberg, upon the nature of the property that had been subjected to summary seizure or dispossession:

> Once licenses are issued ... their continued possession may become essential in the pursuit of a livelihood .... [Therefore] the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

Id. at 539.

In considering the type of hearing required on those particular facts, the Court stated that "procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgment in the amounts claimed being rendered against the licensee." Id. at 540 (emphasis added). The special emphasis that we place on the phrase "in the amounts claimed" stems from our reading Bell to require a hearing both to determine the probability of a judgment's being had and that the amount of the bond, if required at all, be reasonable relative to whatever judgment might finally become due.[6/]

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We need not reach the question whether an automobile itself is to be treated like the license and registration in

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Bell, since Lynch v. Household Finance Corp., 405 U.S. 538 (1972), and Fuentes v. Shevin, 407 U.S. 67 (1972), have made it clear that any person's right to enjoy any of his personal property may not be deprived without procedural due process and that it is immaterial that the deprivation by retention may be temporary and nonfinal.

We hold, then, that a retention after search under 19 U.S.C. § 1594 based solely on a violation of 19 U.S.C. § 1459 cannot be effected unless the person in charge[7/] of the vehicle has been given the opportunity to be heard on the question whether § 1459 was in fact violated and the appropriate customs official has made an initial assessment of a fine under 19 U.S.C. § 1460. This holding, we believe, places a permissible construction on § 1594 which saves that provision's constitutionality as applied to these limited facts.[8/] We hold additionally that the assessment of a fine under § 1460, since it will represent only the maximum potential liability, must then be subjected to consideration after the filing of a petition for remission and mitigation under 19 U.S.C. § 1618. Only by requiring such a procedure can a realistic determination of liability be made, and we read Bell to require precisely that sort of determination.

Assessing this holding as applied to the facts in Rich's case, it is clear that we do little violence to the procedures presently employed under defendant Thornton's

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Assessing this holding as applied to the facts in Rich's case, it is clear that we do little violence to the procedures presently employed under defendant Thornton's auspices. In his amended stipulation, Thornton states that

> Frequently, in cases not involving serious offenses or very valuable property, a petition for remission or mitigation is made on the spot by the person, and tentatively decided by the customs officer at that time.

This procedure was allegedly followed in Rich's case, since Rich filed his petition immediately, but it appears from the record that Inspector Clark did not actually exercise the power of remittance under § 1618; rather, it appears that he merely implemented the provisions of 19 U.S.C. § 1614 which permit a vehicle to be released if a deposit equal to the value of the vehicle as assessed under 19 U.S.C. § 1606 has been ~~determined~~ paid. That Inspector Clark could have exercised power under the circumstances is evident from the stipulation that Clark had previously been delegated authority "to entertain certain customs mitigation and remission cases, such as Rich's." Our holding simply requires the designated customs officer to exercise the § 1618 power of remittance or mitigation in order that a realistic penalty may be assessed at the outset. Once this power is exercised, the interests of the Government in ensuring the collection of the penalty imposed are satisfied when a deposit equal to that of the assessed penalty, rather than the value of the vehicle, if greater, has been made.[9/]

To summarize with respect to the seizure and holding

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Rich filed his petition immediately, but it appears from the record that Inspector Clark did not actually exercise the power of remittance under § 1618; rather, it appears that he merely implemented the provisions of 19 U.S.C. § 1614 which permit a vehicle to be released if a deposit equal to the value of the vehicle as assessed under 19 U.S.C. § 1606 has been ~~determined~~ paid. That Inspector Clark could have exercised power under the circumstances is evident from the stipulation that Clark had previously been delegated authority "to entertain certain customs mitigation and remission cases, such as Rich's." Our holding simply requires the designated customs officer to exercise the § 1618 power of remittance or mitigation in order that a realistic penalty may be assessed at the outset. Once this power is exercised, the interests of the Government in ensuring the collection of the penalty imposed are satisfied when a deposit equal to that of the assessed penalty, rather than the value of the vehicle, if greater, has been made.[9/]

To summarize with respect to the seizure and holding of plaintiff Rich's vehicle, we hold that, before a vehicle can be retained by the Government after initial border search and seizure for purposes of going to the appropriate

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border station, where only a simple violation of 19 U.S.C. § 1459 is charged, one so charged is entitled to a hearing before an appropriate customs official[10] at which time the following must occur: (1) the accused may present his version of the facts surrounding his alleged violation of § 1459 after receiving notice orally or in writing of that allegation; (2) he shall have the privilege of confronting and questioning any witnesses against him; (3) the official is required to determine whether there is reasonable ground to believe that § 1459 was violated by the accused; (4) the accused must be advised of and allowed to submit a petition for remittance or mitigation under § 1618; (5) the official is required to exercise the discretion granted under § 1618 to determine the maximum fine that should, in the circumstances, be imposed; (6) the accused is afforded the opportunity to post security equal to the maximum penalty as determined in (5) above, which, if posted, will secure the release of the vehicle; and (7) the hearing officer shall summarize the substance of the hearing and his conclusions on the appropriate forms.[11] Any or all of these rights may be waived by the accused after a full explanation of them has been given and the accused has executed a written waiver of them.

Plaintiff Rich next asserts that the procedures under which a final determination of the penalty to be imposed

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§ 1459 after receiving notice orally or in writing of that allegation; (2) he shall have the privilege of confronting and questioning any witnesses against him; (3) the official is required to determine whether there is reasonable ground to believe that § 1459 was violated by the accused; (4) the accused must be advised of and allowed to submit a petition for remittance or mitigation under § 1618; (5) the official is required to exercise the discretion granted under § 1618 to determine the maximum fine that should, in the circumstances, be imposed; (6) the accused is afforded the opportunity to post security equal to the maximum penalty as determined in (5) above, which, if posted, will secure the release of the vehicle; and (7) the hearing officer shall summarize the substance of the hearing and his conclusions on the appropriate forms.[11/] Any or all of these rights may be waived by the accused after a full explanation of them has been given and the accused has executed a written waiver of them.

Plaintiff Rich next asserts that the procedures under which a final determination of the penalty to be imposed is reached are violative of the Due Process Clause. The process that we have just mandated for Rich and those

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similarly situated reduces this particular claim to these contentions: (1) the final determination as to whether he violated § 1459 was reached without his having adequate

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opportunity to contest the factual findings made by the Secretary of the Treasury or his delegatees; and (2) the procedures available to appeal that decision are either inadequate or deprive him of the "equal protection of the law."

As a preliminary matter, we note that the only "factual" determination relevant to Rich's case is whether he, in crossing the border, failed "immediately [to] report his arrival" under § 1459. It appears to us that the initial hearing we now require in and of itself affords alleged violators of § 1459 due process and that no other process need be afforded to protect their interests.[12/] Rich's vehicle would be subject to libel or condemnation only after the District Director had reached a final determination under § 1618 and Rich had refused to pay the penalty so assessed. Rich's ability to contest that decision under 19 U.S.C. §§ 1607 & 1608,[13/] particularly the requirement of posting a $250 penal bond under the latter section, is adequate both to protect his rights and to protect the Government from the prosecution of frivolous claims. United States v. Kras, 409 U.S. 434 (1973), is dispositive of Rich's argument on this point.[14/]

B. Lee's Due Process Claim.

Plainly, plaintiff Lee's position differs materially

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law."

As a preliminary matter, we note that the only "factual" determination relevant to Rich's case is whether he, in crossing the border, failed "immediately [to] report his arrival" under § 1459. It appears to us that the initial hearing we now require in and of itself affords alleged violators of § 1459 due process and that no other process need be afforded to protect their interests.[12/] Rich's vehicle would be subject to libel or condemnation only after the District Director had reached a final determination under § 1618 and Rich had refused to pay the penalty so assessed. Rich's ability to contest that decision under 19 U.S.C. §§ 1607 & 1608,[13/] particularly the requirement of posting a $250 penal bond under the latter section, is adequate both to protect his rights and to protect the Government from the prosecution of frivolous claims. United States v. Kras, 409 U.S. 434 (1973), is dispositive of Rich's argument on this point.[14/]

B. Lee's Due Process Claim.

Plainly, plaintiff Lee's position differs materially from that of Rich in that Lee's vehicle and the contents therein became immediately subject to forfeiture as a penalty

in addition to any other penalty under 19 U.S.C. § 1460; Lee was charged with violating 19 U.S.C. § 1595a, relating to the importation of any article contrary to law, and 21 U.S.C. § 881, relating to the forfeiture of vehicles used to import "controlled substances." At the same time, Lee's possessory interest insofar as the vehicle itself is concerned is certainly no less than that of Rich. The reasons for requiring a pre-retention hearing in Rich's case are equally applicable to Lee, with the exception that the immediate exercise of discretion under § 1618 cannot be required of customs officials -- at least at the initial hearing. This is so because the factual situation with which customs officials are presented where the vehicle is subject to forfeiture as a penalty includes the need to refer some cases to the United States Attorney for further investigation and possible criminal prosecution.

Where charges are made that subject vehicles to forfeiture as a penalty and the customs officials choose not to exercise their discretion of remittance under § 1618 at the initial hearing at the border station, we hold that an additional hearing must be held within a reasonable period of time after the seizure. While a "reasonable period" will depend on the facts of each seizure, it would seem that three regular working days would give customs officials sufficient time to apply their expertise to a

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to impose [illegible]

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Where charges are made that subject vehicles to forfeiture as a penalty and the customs officials choose not to exercise their discretion of remittance under § 1618 at the initial hearing at the border station, we hold that an additional hearing must be held within a reasonable period of time after the seizure. While a "reasonable period" will depend on the facts of each seizure, it would seem that three regular working days would give customs officials sufficient time to apply their expertise to a given situation. At this hearing, the one whose property has been seized must be allowed to present his version of

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the facts to the customs official who will, at the termination of the hearing, exercise the power of remittance under § 1608.

Having decided this, the question remains whether subsequent proceedings afford process sufficient to satisfy the fifth amendment. We find that these procedures, considered previously with respect to plaintiff Rich, do comport with the Due Process Clause. Lee argues that "forfeiture" is essentially a "criminal" proceeding for purposes of the fifth amendment, directing our attention particularly to United States v. United States Coin & Currency, 401 U.S. 715 (1971). That case held that the fifth amendment's privilege against self-incrimination could be invoked in forfeiture proceedings because, taken as a whole, forfeiture proceedings "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." Id. at 721-22. We fully subscribe to this principle, but in this case plaintiff Lee has not, unlike the plaintiff in United States Coin, asserted that any conduct for which his mitigated forfeiture was finally imposed was in any way constitutionally protected.[15/] We perceive no distinction between forfeiture under 19 U.S.C. § 1595a or 21 U.S.C. § 881 and forfeiture under 19 U.S.C. § 1497. Forfeiture proceedings under that latter statute

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the fifth amendment. We find that these procedures, considered previously with respect to plaintiff Rich, do comport with the Due Process Clause. Lee argues that "forfeiture" is essentially a "criminal" proceeding for purposes of the fifth amendment, directing our attention particularly to United States v. United States Coin & Currency, 401 U.S. 715 (1971). That case held that the fifth amendment's privilege against self-incrimination could be invoked in forfeiture proceedings because, taken as a whole, forfeiture proceedings "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." Id. at 721-22. We fully subscribe to this principle, but in this case plaintiff Lee has not, unlike the plaintiff in United States Coin, asserted that any conduct for which his mitigated forfeiture was finally imposed was in any way constitutionally protected.[15/] We perceive no distinction between forfeiture under 19 U.S.C. § 1595a or 21 U.S.C. § 881 and forfeiture under 19 U.S.C. § 1497. Forfeiture proceedings under that latter statute were reviewed and sanctioned recently in One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972). Lee argues that One Lot is distinguishable in that the proceeding

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there was against imported contraband rather than, as here, against the vehicle that was an "instrumentality" used to import the contraband illegally. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), does not require the result that Lee would urge upon us. In that case the Court held that evidence obtained in violation of the fourth amendment may not be used to sustain a forfeiture. Lee's complaint does not present us with such a claim.

V. SIXTH AMENDMENT CLAIMS.

Plaintiffs' sixth amendment claims are based upon their contention that the forfeiture provisions adopted by Congress as an alternative to criminal prosecution must be denominated "criminal" for purposes of that amendment. To sustain this claim, which has some superficial appeal, would require us, however, to cast serious doubt on a long line of cases decided by the Supreme Court that have sanctioned such governmental action where the protections of the sixth amendment were not afforded. Helvering v. Mitchell, 303 U.S. 391, 400 (1938), and cases cited therein. The opinion of Mr. Justice Brandeis for the Court took cognizance, as we do, of the "comparative severity" of the sanctions which may be imposed in forfeiture proceedings, id.; we conclude that the Due Process Clause of the fifth amendment provides adequate protection in the forfeiture

result that Lee would urge upon us. In that case the Court held that evidence obtained in violation of the fourth amendment may not be used to sustain a forfeiture. Lee's complaint does not present us with such a claim.

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VI. RELIEF.

Having decided the constitutional claims asserted by plaintiffs, we turn to consideration of what relief they might be entitled to in this court. Plaintiffs request that the Commissioner of Customs be required to remit the respective fines of $25 and $100 which were assessed and collected from Rich and Lee. The opportunity for plaintiffs to pursue their remedies under 19 U.S.C. § 1618 having long since passed, the question becomes whether this court's equitable power to fashion appropriate relief should be used, and, if so, in what fashion. The scope of review of such a determination by the Commissioner in a § 1618 proceeding is, of course, greatly limited because of the wide discretion granted to the Secretary of the Treasury and his delegatees by Congress to make such determinations. We consider our scope of review to be equally narrow, but rely on the Supreme Court's statement in United States v. United States Coin & Currency, 401 U.S. at 721, that "the courts have intervened when the innocent petitioner's protests have gone unheeded."

Considering the totality of circumstances present with respect to both Rich and Lee, we conclude that their protests did not go "unheeded" to the extent of our setting aside the fines imposed. We therefore decline to order remission of those fines. With respect to the damages

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Considering the totality of circumstances present with respect to both Rich and Lee, we conclude that their protests did not go "unheeded" to the extent of our setting aside the fines imposed. We therefore decline to order remission of those fines. With respect to the damages sought by the plaintiffs, we do not reach the merits but

remit the plaintiffs to the district court. Melendez v. Shultz, 356 F. Supp. at 1211.[16/]

Judgment in accordance with this opinion.

Dated this 10th day of January, 1974.

/James L. Oakes
U. S. Circuit Judge

James S. Holden
U. S. District Judge

Albert W. Coffrin
U. S. District Judge

1. Although the record is not free from doubt, this determination apparently constituted a finding by Clark that Rich's automobile was worth $50, since under 19 U.S.C. § 1614, the deposit must cover the full value of the vehicle as appraised under 19 U.S.C. § 1606. Presumably a similar finding was also made with respect to defendant Thornton's statement to plaintiff Lee that an $1,800 deposit would be required to secure the release of his van, supra.

2. We note that the Court in Cooper placed some emphasis upon the fact that the seizure of the vehicle was justified under a California statute by the need to seize the vehicle as evidence in the criminal action which ensued. There is no plausible argument, and, indeed, the Government makes no suggestion, that the seizures of the vehicles in this case were for the purpose of preserving them as evidence in any proceeding, civil or criminal.

3. This section exempts vehicles used as common carriers in the transaction of business unless the driver of such a vehicle "was at the time of the alleged illegal act a consenting party or privy thereto."

4. This issue has apparently not been the subject of litigation. While simple failure to report at a

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of the vehicle as appraised under 19 U.S.C. § 1606. Presumably a similar finding was also made with respect to defendant Thornton's statement to plaintiff Lee that an $1,800 deposit would be required to secure the release of his van, supra.

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3. This section exempts vehicles used as common carriers in the transaction of business unless the driver of such a vehicle "was at the time of the alleged illegal act a consenting party or privy thereto."

4. This issue has apparently not been the subject of litigation. While simple failure to report at a border station under the circumstances is an act that

Congress sought to penalize, the reporting procedure is essentially a mechanism which allows the Government to safeguard its important interests in controlling the entry of foreign nationals and dangerous substances, as well as its interests in collecting duty on dutiable merchandise.

5. We reemphasize that the seizure of Rich's automobile is justified, under § 1594, only to secure the interest of the Government in collecting whatever penalty was due to the Government under § 1460. Rich's automobile is not subject to forfeiture as a penalty in and of itself, as is the case of plaintiff Lee's van, discussed infra.

6. Toward the end of his opinion for the Court, Mr. Justice Brennan appeared to summarize the holding of the Court by stating that Georgia "must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident." 402 U.S. at 542. This language, as well as that quoted in the text from 402 U.S. at 540 is described as the "holding," yet the phrase "in the amounts claimed" is absent from the holding as set out in 402 U.S. at 542. This discrepancy, if it may be called

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language referring to "the amounts claimed."

7. This case does not present us with a situation wherein the owner of the instrumentality involved in the offense is other than the individual in charge of it. Although our decision is necessarily confined to the problems generated by the facts before us, we think that an owner, not in charge of the property involved, is probably entitled to some constitutionally afforded protection before the seizure and forfeiture of his property. This very question is sub judice in Pearson Yacht Leasing Co. v. Massa, No. 1018-72 (D.P.R. Mar. 29, 1973) (three-judge court), prob. juris. noted sub nom. Calero-Toledo v. Pearson Yacht Leasing Co., 42 U.S.L.W. 3173 (U.S. Oct. 9, 1973). The statutory scheme under attack in Pearson is patterned after the federal statutes invoked here against plaintiff Lee -- providing for the forfeiture of vehicles carrying "controlled substances" across the border.

8. The Government argues that the summary seizure of personalty where federal action is involved has long been sanctioned by the Supreme Court. The Government directs our attention particularly to the cases which have sustained the constitutionality of

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8. The Government argues that the summary seizure of personalty where federal action is involved has long been sanctioned by the Supreme Court. The Government directs our attention particularly to the cases which have sustained the constitutionality of statutes authorizing the summary seizure of assets where collection of the internal revenue is involved.

E.g., Phillips v. Commissioner, 283 U.S. 589 (1931). Two distinctive features of these cases stand out, however; first, the Government in all cases has made a preliminary determination that the tax is due and the amount of that tax; and, second, there has been present a threat that assets could be wasted or removed from the country. Although we need not reach the question here, it would seem that the seizure of an automobile as security to protect the Government's interest in collecting a $50 fine, even with a requisite hearing, might well have been beyond the intent of Congress in enacting § 1594.

9. We do not, and would not, read congressional intent in enacting § 1614 as requiring a party to post security in excess of the maximum fine that could be collected by the Government under all relevant statutes. Section 1614 is obviously designed to deal with cases in which forfeiture of a vehicle as a penalty in addition to other penalties is authorized, which is not the case where a simple violation of § 1459 is charged. By construing § 1594 as requiring the Government to exercise immediately its powers of remittance and mitigation under § 1618 in an adequate hearing, one accused of a violation of § 1459, by depositing cash or a bond to cover the maximum

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reduced under § 1618 initially or subsequently), will secure release of his vehicle not under § 1614 but as a result of his fine having been tentatively "paid." We find the power of the Secretary of the Treasury and his delegatees to require such a deposit under 19 U.S.C. § 1623 rather than under § 1614.

10. An "appropriate" customs official would be an official possessing the delegated authority to act pursuant to 19 U.S.C. § 1618 and one who, until the time of the hearing, has not been directly involved in the apprehension or accuation of the accused. Cf. Morrissey v. Brewer, 408 U.S. 471, 485-87 (1973). The accused, of course, after it has been explained to him that he has a right to an impartial hearing before an official other than one by whom he has been accused, may waive such a right and consent in writing to a hearing before the same official who has accused him.

11. The forms presently used by the Bureau of Customs and submitted to this court would seem to be adequate for these purposes. Customs Forms 4609 & 5955 (3/70).

12. We are unable to determine on the present record whether Rich's hearing before Inspector Clark was so

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11. The forms presently used by the Bureau of Customs and submitted to this court would seem to be adequate for these purposes. Customs Forms 4609 & 5955 (3/70).

12. We are unable to determine on the present record whether Rich's hearing before Inspector Clark was so substantially different from the hearing we have now required that Rich should have a remedy in damages

under the relevant statutes. We leave this decision to another forum, see part VI infra.

13. We disagree with Rich's contention, as does the Government, that the remedy afforded by § 1608 is not available to contest the imposition of a fine where no forfeiture of property as a penalty is involved. We read § 1595a as not allowing the sale of a vehicle until such time as the owner has exhausted all administrative appeals and has failed either to pay the fine or pursue his remedy under § 1608.

14. Rich asserts that the requirement that he post a bond in the amount of $250 violates the "equal protection" aspects of the fifth amendment, Bolling v. Sharpe, 347 U.S. 497 (1954), because, were the assessed value of his seized property in excess of $2,500, such a bond would not be required under 19 U.S.C. § 1610. Under our decision today, Rich and others similarly situated may have their vehicles held as surety only upon their failure to post a cash deposit or bond in a sum equal to the maximum penalty they might incur under § 1460. In this posture, and because by seeking judicial condemnation proceedings Rich assumes the additional obligation to pay the costs of such proceedings if condemnation is ordered

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protect the interests of the Government. Rich does not assert a constitutional right to a hearing in an Article III court, and rightly so. See Ortwein v. Schwab, 410 U.S. 656 (1973).

15. We note the Court's reference and tacit approval of the provisions of 19 U.S.C. § 1618, especially the Court's statement that "It is not to be presumed that the Secretary [of the Treasury] will not conscientiously fulfill this trust .... " 401 U.S. at 721.

16. At least one court has recently held that a plaintiff in somewhat similar circumstances is barred by the doctrine of sovereign immunity from recovery. See States Marine Lines, Inc. v. Shultz, 359 F. Supp. 512 (D.S.C. 1973). We express no view on this question.

(Civ. 6451 → 29)

APPENDIX B

JUDGMENT ON DECISION BY THE COURT — CIV 32 (7-63)

United States District Court

FOR THE

DISTRICT OF VERMONT

James P. Lee, Jr.
vs.
William L. Thornton, District Director of Customs, et al

CIVIL ACTION FILE NO. 6451

xx

Ronald Rich
vs.
William L. Thornton, District Director of Customs, et al

JUDGMENT
Civil Action No. 6762

Hon. James L. Oakes
This action came on for trial (hearing) before the Court, Honorable James S. Holden
Three Judge Court
Hon. Albert W. Coffrin
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx United States District Judges presiding, and the issues having been duly tried

(heard) and a decision having been duly rendered,

It is Ordered and Adjudged :

That 19 U.S.C. S1460 is hereby declared inapplicable to permit seizure or forfeiture of a vehicle for mere failure to report under 19 U.S.C. S1459;

That 19 U.S.C. S1594 is hereby declared to require a preliminary hearing on the question of violation of S1459 and an initial assessment of a fine under 19 U.S.C. S1460 by the appropriate customs official;

That 19 U.S.C. S1595a is hereby declared to require a preliminary hearing on the question of violation thereof, as is 21 U.S.C. S881(a)(4),

all in accordance with the opinion and order of the Court, dated January 10, 1974. Enforcement of each of said sections contrary hereto is hereby enjoined. The mandate hereof is stayed for 60 days from the date hereof, or, if an appeal is taken, until judgment becomes final.

Remission of fines to plaintiffs is hereby declined, and plaintiffs are remitted to the district court(single judge) on the question of damages.

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William L. Thornton, District Director of Customs, et al

xx

JUDGMENT

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vs.

William L. Thornton, District Director of Customs, et al

Hon. James L. Oakes

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Three Judge Court

Hon. Albert W. Coffrin

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It is Ordered and Adjudged :

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That 19 U.S.C. S1594 is hereby declared to require a preliminary hearing on the question of violation of S1459 and an initial assessment of a fine under 19 U.S.C. S1460 by the appropriate customs official;

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all in accordance with the opinion and order of the Court, dated January 10, 1974. Enforcement of each of said sections contrary hereto is hereby enjoined. The mandate hereof is stayed for 60 days from the date hereof, or, if an appeal is taken, until judgment becomes final.

Remission of fines to plaintiffs is hereby declined, and plaintiffs are remitted to the district court(single judge) on the question of damages.

Dated at Burlington, in the District of Vermont, this 10th day of April, 1974.

Clerk of Court

Filed April 10, 1974

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED
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CLERK
BY DEPUTY CLERK

COPY

JAMES P. LEE, JR.	::	
vs.	::	
	::	CIVIL ACTION NO. 6451
WILLIAM L. THORNTON, District Director of United States Customs for the District of Vermont; VERNON D. ACREE, United States Commissioner of Customs; and WILLIAM E. SIMON, United States Secretary of the Treasury	::	
RONALD RICH	::	
vs.	::	
WILLIAM L. THORNTON, District Director of United States Customs for the District of Vermont; VERNON D. ACREE, United States Commissioner of Customs; and WILLIAM E. SIMON, United States Secretary of the Treasury	::	CIVIL ACTION NO. 6762

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

NOW COME the above-named plaintiffs, James P. Lee, Jr. and Ronald Rich, by their counsel, and hereby give notice pursuant to Rules 10 and 46 of the Supreme Court Rules that they appeal to the United States Supreme Court, pursuant to 28 U.S.C. § 1253, from the judgment of this Court in the above actions, dated April 10, 1974, insofar as said judgment denies remission of fines

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	::	CIVIL ACTION NO. 6451
WILLIAM L. THORNTON,	::	
District Director of	::	
United States Customs	::	
for the District of	::	
Vermont;	::	
VERNON D. ACREE,	::	
United States Commissioner	::	
of Customs; and	::	
WILLIAM E. SIMON,	::	
United States Secretary	::	
of the Treasury	::	
	::	
	::	
RONALD RICH	::	
	::	
vs.	::	
	::	
WILLIAM L. THORNTON,	::	CIVIL ACTION NO. 6762
District Director of	::	
United States Customs	::	
for the District of	::	
Vermont;	::	
VERNON D. ACREE,	::	
United States Commissioner	::	
of Customs; and	::	
WILLIAM E. SIMON,	::	
United States Secretary	::	
of the Treasury	::	

COPY

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

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1. that the penalties assessed against both plaintiffs by defendants constituted criminal penalties for purposes of the Fourth, Fifth, and Sixth Amendments to the United States Constitution;

2. that the procedures used by defendants to seize plaintiffs' property, and to assess penalties against them, violated their rights to all the constitutional procedures afforded to the criminally accused;

3. that the said procedures used by the defendants, inter alia, specifically denied plaintiffs the following rights under the Sixth Amendment to the United States Constitution:

a. the right to a speedy and public trial before a court of competent jurisdiction,

b. the right to a trial by jury,

c. the right to be informed of the nature and cause of the accusation,

d. the right to be confronted with adverse witnesses, and

e. the right to the assistance of counsel; and

4. that the said procedures used by defendants violated plaintiffs' rights under the Fifth Amendment to the United States Constitution in that they deprived plaintiffs of their property without due process of law.

DATED at Burlington, Vermont, this 17th day of May, 1974.

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2. that the procedures used by defendants to seize plaintiffs' property, and to assess penalties against them, violated their rights to all the constitutional procedures afforded to the criminally accused;

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a. the right to a speedy and public trial before a court of competent jurisdiction,

b. the right to a trial by jury,

c. the right to be informed of the nature and cause of the accusation,

d. the right to be confronted with adverse witnesses, and

e. the right to the assistance of counsel; and

4. that the said procedures used by defendants violated plaintiffs' rights under the Fifth Amendment to the United States Constitution in that they deprived plaintiffs of their property without due process of law.

DATED at Burlington, Vermont, this 6th day of May, 1974.

JAMES P. LEE, JR.

By J. Morris Clark

J. MORRIS CLARK, Esq.
Vermont Legal Aid, Inc.
192 Bank Street
Burlington, Vermont

DATED at Middlebury, Vermont, this 6th day of ~~April~~ May, 1974.

RONALD RICH

By _____
PETER F. LANGROCK, Esq.
Langrock & Sperry
15 South Pleasant Street
Middlebury, Vermont

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT upon the defendants, WILLIAM L. THORNTON, VERNON D. ACREE and WILLIAM E. SIMON, by mailing a copy of same with postage prepaid to:

William B. Gray, Esq.
Assistant United States Attorney
Federal Building
Rutland, Vermont 05701, and

The Solicitor General
United States Department of Justice
Washington, D.C. 20530

attorneys of record, this 6th day of ~~April~~ May, 1974.

_____
J. MORRIS CLARK, Esq.
Vermont Legal Aid, Inc.

APPENDIX D

UNITED STATES CODE

19 U.S.C. 1459. Contiguous countries; report and manifest

The master of any vessel of less than five net tons carrying merchandise and the person in charge of any vehicle arriving in the United States from contiguous country, shall immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place at which such vessel or vehicle shall cross the boundary line or shall enter the territorial waters of the United States, and if such vessel or vehicle have on board any merchandise, shall produce to such customs officer a manifest as required by law, and no such vessel or vehicle shall proceed farther in land nor shall discharge or land any merchandise, passengers, or baggage without receiving a permit therefor from such customs officer. Any person importing or bringing merchandise into the United States from a contiguous country otherwise than in a vessel or vehicle shall immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place at which he shall cross the boundary line and shall present such merchandise to such customs officer for inspection.

19 U.S.C. 1460. Save; penalties for Failure to report or file manifest

The master of any vessel or the person in charge of any vehicle who fails to report arrival in the United States as required by section 1459 of this title, or if so reporting proceeds further inland without a permit from the proper customs officer, shall be subject to a penalty of $100 for each offense. If any merchandise is imported or brought into the United States in any vessel or vehicle, or by any person otherwise than in a vessel or vehicle, from a contiguous country, which vessel, vehicle, or merchandise is not so reported to the proper customs officers; or if the master of such vessel or the person in charge of such vehicle fails to file a manifest for the merchandise carried therein, or discharges or lands such merchandise without a permit; such merchandise and the vessel or vehicle, if any, in which it was imported or brought into the United States shall be subject to forfeiture; and the master of such vessel or the person in charge of such vehicle, or the person importing or bringing in merchandise otherwise than in a vessel or vehicle, shall, in addition to any other penalty, be liable to a penalty equal to the value of the merchandise which was not reported, or not included in the manifest, or which was discharged or landed without a permit. If any vessel or vehicle not so reported carries any passenger; or if any passenger is discharged or landed from any such vessel or vehicle before it is so reported, or after such report but without a permit; the

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boundary line or shall enter the territorial waters of the United States, and if such vessel or vehicle have on board any merchandise, shall produce to such customs officer a manifest as required by law, and no such vessel or vehicle shall proceed farther in land nor shall discharge or land any merchandise, passengers, or baggage without receiving a permit therefor from such customs officer. Any person importing or bringing merchandise into the United States from a contiguous country otherwise than in a vessel or vehicle shall immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place at which he shall cross the boundary line and shall present such merchandise to such customs officer for inspection.

19 U.S.C. 1460. Save; penalties for Failure to report or file manifest

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19 U.S.C. 1595a. Forfeitures; Penalty for Aiding Unlawful Importation

(a) Except as specified in the proviso to section 1594 of this title, every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation,

bringing in, unlading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been introduced, or attempted to be introduced, into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft, or other thing or otherwise, shall be seized and forfeited together with its tackle, apparel, furniture, harness, or equipment.

(b) Every person who directs, assists finacially or otherwise, or is any way concerned in any unlawful activity mentioned in the preceding subsection shall be liable to a penalty equal to the value of the article or articles introduced or attempted to be introduced.

19 U.S.C. 1618. Remission or Mitigation of Penalties

Whenever any person interested in any vessel, vehicle merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs officer to take testimony upon such petition: Provided, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition.

21 U.S.C. 88]. Forfeitures-property Subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragragh (1) or (2).

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mentioned in the preceding subsection shall be liable to a penalty equal to the value of the article or articles introduced or attempted to be introduced.

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Whenever any person interested in any vessel, vehicle merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs officer to take testimony upon such petition: Provided, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition.

21 U.S.C. 88]. Forfeitures-property Subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragragh (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that-

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this

subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

SEIZURE PURSUANT TO SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

(b) Any property subject to forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when-

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

CUSTODY OF ATTORNEY GENERAL

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under the provisions of this subchapter, the Attorney General may-

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(5) All books, records and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

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(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

CUSTODY OF ATTORNEY GENERAL

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under the provisions of this subchapter, the Attorney General may-

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it to an appropriate location for disposition in accordance with law

OTHER LAWS AND PROCEEDINGS APPLICABLE

(d) All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such

property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

DISPOSITION OF FORFEITED PROPERTY

(e) Whenever property is forfeited under this subchapter the Attorney General may-

(1) retain the property for official use;

(2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, but the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising and court costs;

(3) require that the General Services Administration take custody of the property and remove it for disposition in accordance with law; or

(4) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General).

FORFEITURE OF SCHEDULE I SUBSTANCES

(f) All controlled substances in schedule I that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

. . .

IN THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

JAMES P. LEE, JR. and RONALD RICH, Plaintiffs	::	
vs.	::	
WILLIAM THORNTON, District Director of United States Customs for the District of Vermont; VERNON D. ACREE, United States Commissioner of Customs; WILLIAM E. SIMON, United States Secretary of the Treasury; and THE UNITED STATES OF AMERICA, Defendants	::	APPELLATE DOCKET NO. 73-7006

MOTION TO CONSOLIDATE CASES ON APPEAL

NOW COME the above-named appellants, by their counsel, and move the Court pursuant to Rule 46 of the Supreme Court Rules to consolidate their cases on appeal in light of the facts that the Court below issued a joint opinion and order in both cases, and both cases raise similar and related questions of law.

DATED at Burlington, Vermont, this 2 day of July, 1974.

JAMES P. LEE, JR.

By John A. Dooley

JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
192 Bank Street
Burlington, Vermont 05401

DATED at Middlebury, Vermont, this 2 day of July, 1974.

RONALD RICH

By Peter F. Langrock
PETER F. LANGROCK
Langrock & Sperry
15 South Pleasant Street
Middlebury, Vermont 05753

RECEIVED
JUL 5 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JAMES P. LEE, JR. and RONALD RICH, Plaintiffs	::	
vs.	::	
WILLIAM THORNTON, District Director of United States Customs for the District of Vermont; VERNON D. ACREE, United States Commissioner of Customs; WILLIAM E. SIMON, United States Secretary of the Treasury; and THE UNITED STATES OF AMERICA, Defendants	::	APPELLATE DOCKET NO. 73-7006

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COME the above-named appellants, by their respective counsel, and move the Court pursuant to Rule 53 of the Supreme Court Rules and 28 U.S.C. § 1915 for leave to proceed in this case without the payment of fees and costs, and further move the Court to make appropriate provision for payment of the costs of reproduction of the record, of printing of briefs and appendices and of other costs of this appeal as the Court shall deem fit. In support of this motion appellants refer the Court to their Affidavits of Poverty filed herewith.

DATED at Burlington, Vermont, this 28 day of June, 1974.

JAMES P. LEE, JR.

By John A. Dooley

JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
192 Bank Street
Burlington, Vermont 05401

DATED at Middlebury, Vermont, this 28 day of June, 1974.

RONALD RICH

By Peter F. Langrock

PETER F. LANGROCK
Langrock & Sperry
15 South Pleasant Street
Middlebury, Vermont 05753

IN THE SUPREME COURT OF THE UNITED STATES

JAMES P. LEE and RONALD RICH, Plaintiffs	::	
vs.	::	Appellate Docket No._____
WILLIAM THORNTON, District Director of United States Customs for the District of Vermont; VERNON D. ACREE, United States Commissioner of Customs; WILLIAM E. SIMON, United States Secretary of the Treasury; and THE UNITED STATES OF AMERICA, Defendants	::	

AFFIDAVIT OF JAMES P. LEE IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES the above-named plaintiff, James P. Lee, 702 S. 4th Street, Fresno, California, being duly sworn, and hereby affides and states as follows:

1. The nature of the above-named action is an appeal pursuant to 28 U.S.C. § 1253 from the holding of the three-judge United States District Court for the District of Vermont that plaintiff is not entitled to remission of the penalty assessed against him pursuant to 19 U.S.C. § 1459 and 1595a and 21 U.S.C. § 881, inasmuch as the assessment of the said penalty was a civil proceeding and it was not constitutionally necessary to afford plaintiff the benefit of criminal trial procedures.

2. Plaintiff believes that he is entitled to redress in this proceeding.

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WILLIAM THORNTON, ::
District Director of ::
United States Customs for ::
the District of Vermont; ::
VERNON D. ACREE, ::
United States Commissioner ::
of Customs; ::
WILLIAM E. SIMON, ::
United States Secretary ::
of the Treasury; and ::
THE UNITED STATES ::
OF AMERICA, ::
Defendants ::

AFFIDAVIT OF JAMES P. LEE IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES the above-named plaintiff, James P. Lee, 702 S. 4th Street, Fresno, California, being duly sworn, and hereby affides and states as follows:

1. The nature of the above-named action is an appeal pursuant to 28 U.S.C. § 1253 from the holding of the three-judge United States District Court for the District of Vermont that plaintiff is not entitled to remission of the penalty assessed against him pursuant to 19 U.S.C. § 1459 and 1595a and 21 U.S.C. § 881, inasmuch as the assessment of the said penalty was a civil proceeding and it was not constitutionally necessary to afford plaintiff the benefit of criminal trial procedures.

2. Plaintiff believes that he is entitled to redress in this proceeding.

3. Plaintiff is unable to pay the costs of the proceeding or to give security therefore. In support of this assertion plaintiff makes the following allegations.

4. Plaintiff has no liquid financial assets other than $50 in cash. Plaintiff owns no stocks, bonds, or negotiable instruments of value.

5. Plaintiff owns no real property whatsoever and no personal property other than personal clothing and effects.

6. Plaintiff's only income consists of approximately $110 per week net income from his employment as a cook at a restaurant in Fresno, California.

7. Plaintiff's income is insufficient to defray his costs of living and in addition to pay for the production of a record, jurisdictional statement, briefs, appendix, filing fee, and other costs in this appeal.

DATED at Burlington, Vermont, this 6th day of May, 1974.

James P. Lee

James P. Lee

Subscribed and sworn to before me this 6th day of May, 1974.

Gloria Duchesne

Notary Public

SUPREME COURT OF THE UNITED STATES

JAMES P. LEE, JR.	[]	NO. _____
v	[]	ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT
WILLIAM L. THORNTON, ET AL	[]	
	[]	CIVIL ACTION NO. 6451
RONALD RICH	[]	CIVIL ACTION NO. 6762
v	[]	
WILLIAM L. THORNTON, ET AL	[]	

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, RONALD RICH, being first duly sworn according to law, depose and say in support of my application for leave to proceed in forma pauperis and not be required to prepay costs or fees;

1. That I am presently incarcerated in the Vermont State Prison located in Windsor, Vermont,

2. That I have no current income, own no personal property or real estate of any value at this time,

3. That I have debts far exceeding any resources which I have at the present time.

Ronald Rich L.S.
Ronald Rich

STATE OF VERMONT
WINDSOR COUNTY, SS.

At Windsor in said County this 15 day of June 1974, personally appeared RONALD RICH and made oath to the truth of the above.

Before me: Kenneth C Cooley Sr
Notary Public

LANGROCK AND SPERRY
ATTORNEYS AT LAW
MIDDLEBURY, VERMONT 05753

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No. 73-7006

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL COPY

OCTOBER TERM, 1974

JAMES P. LEE, JR. and RONALD RICH, APPELLANTS

v.

WILLIAM THORNTON, DISTRICT DIRECTOR OF THE UNITED STATES CUSTOMS FOR THE DISTRICT OF VERMONT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MOTION TO VACATE OR AFFIRM

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-7006

JAMES P. LEE, JR. and RONALD RICH, APPELLANTS

v.

WILLIAM THORNTON, DISTRICT DIRECTOR OF THE UNITED STATES CUSTOMS FOR THE DISTRICT OF VERMONT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MOTION TO VACATE OR AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellees move that the judgment of the district court be vacated or, alternatively, that it be affirmed.

STATEMENT[1/]

1. On October 27, 1971, a border patrol agent saw appellant Rich, his wife, and their two minor children drive across the border from Canada into the United States at Alburg, Vermont, without passing through a Customs station. The agent stopped Rich's automobile in the vicinity of Swanton, Vermont. The agent accused Rich of having crossed the border illegally and directed him to proceed to the border station at Highgate,

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1/ The facts were stipulated.

Vermont. Customs agents there searched the automobile, advised Rich that he was charged under 19 U.S.C. 1459 with failure to stop at a border checkpoint, told him that a statutory penalty of $100 for him and $500 for each of his three passengers could be assessed against him under 19 U.S.C. 1460, and said they were going to hold the car for payment of the penalty. 2/

Customs officials informed Rich that he could file an immediate petition for remission and mitigation of penalties, pursuant to 19 U.S.C. 1618. Rich filed such a petition at that time and a customs inspector told him that the automobile would be released upon payment of a cash deposit of $50 "toward the ultimate mitigated penalty." Rich paid the deposit and Customs released the automobile.

On January 6, 1972, Rich received a "Notice of Penalty Incurred and Demand for Payment" (Customs Form 5995A) which, among other things, advised him of his rights and the procedures required to request administrative relief (Stip. Ex. B). On January 14, 1972, appellee Thornton, District Director of the Bureau of Customs, notified Rich by letter that the penalty had been mitigated to $25 and that this penalty would be deducted from his $50 deposit, the balance of which

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2/ 19 U.S.C. 1594 provides that whenever a driver or owner of a vehicle becomes subject to a penalty for violation of the customs-revenue laws of the United States, the vehicle involved shall be held for payment of such penalty and may be proceeded against summarily by libel to recover the penalty.

would be returned to Rich.[3] Rich filed no supplemental petition.[4]

2. On October 4, 1971, a border patrol agent saw appellant Lee's van crossing into the United States from Canada at Alburg Springs, Vermont, although the Customs station there was closed. The agent followed the van, driven at that time by an acquaintance of Lee, to East Alburg, Vermont, where the agent stopped it. Lee told the agent that he had not gone to the Immigration and Custom station at Alburg, as directed by the signs at Alburg Springs, because he thought that his vehicle had insufficient fuel to reach it. The agent ordered Lee to drive the van and his passengers to Immigration headquarters in Swanton, Vermont.

After Customs agents in Swanton searched the van, they told Lee that they had found several items of foreign manufacture with no proof of domestic purchase, plus two clip scales and one gram of marijuana seeds; that Lee and the others were free to leave; but that Customs had seized the van and personal property.

The next day Lee asked appellee Thornton about release of the van, and Thornton told him that he would be required to deposit $1,800 in cash to obtain its release. See 19 U.S.C. 1614. On October 19, 1971, Thornton advised Lee that he was charged with failure to stop at the nearest border check-point, in violation of 19 U.S.C. 1459, illegal importation of goods, in

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[3] Though it is not reflected in the record, the government soon

was closed. The agent followed the van, driven at that time by an acquaintance of Lee, to East Alburg, Vermont, where the agent stopped it. Lee told the agent that he had not gone to the Immigration and Customs station at Alburg, as directed by the signs at Alburg Springs, because he thought that his vehicle had insufficient fuel to reach it. The agent ordered Lee to drive the van and his passengers to Immigration headquarters in Swanton, Vermont.

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3/ Though it is not reflected in the record, the government soon sent Rich a check for $25.

4/ The regulations provide that a person not satisfied with the decision on his petition may file a supplemental petition. 19 C.F.R. 171.33.

violation of 19 U.S.C. 1595a, and illegal importation of controlled substances, in violation of 21 U.S.C. 881; that a statutory penalty of $1,845 had been assessed; and that the van and personal property therein were subject to forfeiture.

Thornton also advised Lee of his right to file a petition for mitigation and remission under 19 U.S.C. 1618. On October 27, 1971, Lee filed such a petition, in which he set forth his version of the events of October 4. On November 1, 1971, Thornton notified Lee by letter that the penalty had been remitted in full and that the forfeiture of the van had been mitigated to $100 "in view of the fact that the vehicle was found being used to transport marijuana." Lee filed no supplemental petition, but he paid the $100 and regained possession of the van.

3. Under 16 U.S.C. 1608, the government is obliged to institute judicial forfeiture proceedings for property valued at less than $2500 if a claimant files a claim and $250 bond to cover court costs. Neither appellant filed such a claim and cost bond. Instead, both appellants filed suits in the United States District Court for the District of Vermont against the District Director of Customs, the Commissioner of Customs, the Secretary of the Treasury and, by subsequent amendment, the United States. The complaints sought (1) declaratory judgments that various provisions of the customs laws are unconstitutional, (2) injunctions against the enforcement of those provisions, (3) mandamus relief requiring the return of moneys paid ($25 and $100, respective-

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3. Under 16 U.S.C. 1608, the government is obliged to institute judicial forfeiture proceedings for property valued at less than $2500 if a claimant files a claim and $250 bond to cover court costs. Neither appellant filed such a claim and cost bond. Instead, both appellants filed suits in the United States District Court for the District of Vermont against the District Director of Customs, the Commissioner of Customs, the Secretary of the Treasury and, by subsequent amendment, the United States. The complaints sought (1) declaratory judgments that various provisions of the customs laws are unconstitutional, (2) injunctions against the enforcement of those provisions, (3) mandamus relief requiring the return of moneys paid ($25 and $100, respectively) as mitigated forfeitures or penalties based on violation of

the customs laws, and (4) damages of $2000 each. The cases were consolidated, and a three-judge district court was convened pursuant to 28 U.S.C. 2282.

The court held that it had jurisdiction under the Tucker Act (28 U.S.C. 1346(a)(2)), rejected appellants' constitutional claims, directed appellees to apply the customs laws only in accordance with the construction given them by the court,[5] declined to remit appellants' fines, and returned to the single-judge district court the question of damages (J.S. App. A).

ARGUMENT

1. The sole basis upon which the district court assumed jurisdiction in this case was the Tucker Act, 28 U.S.C. 1346(a)(2), which, insofar as here pertinent, gives the district courts jurisdiction over "[a]ny * * * civil action or claim against the United States * * * founded either upon the Constitution or any Act of Congress * * *." This provision did not give the district court jurisdiction over appellants' claim to enjoin enforcement of the provisions of the customs laws that they challenge as unconstitutional.[6]

5/ The court construed 19 U.S.C. 1460 as not permitting seizure or forfeiture for violation of 19 U.S.C. 1459 based on mere failure to report to a customs station; construed 19 U.S.C. 1594 as requiring a preliminary hearing to determine whether there was a violation of Section 1459 and to assess a preliminary penalty under Section 1460; and construed 19 U.S.C. 1595a and 21 U.S.C. 881(a)(4) as requiring a preliminary hearing to determine whether a violation justifying forfeiture had occurred.

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6/ Although the government challenged the district court's jurisdiction, we did not appeal. But this Court must notice jurisdictional errors, even sua sponte if they have not been raised by the parties. See, e.g., Edelman v. Jordan, 415 U.S. 651, 677-678; Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 209; McGrath v. Kristensen, 340 U.S. 162, 167; Rochester Tel. Corp. v. United States, 307 U.S. 125, 128, n.3; United States v. Corrick, 298 U.S. 435, 440. A claim of lack of subject matter jurisdiction "may be considered, and appropriate judgment given, at any stage of the proceedings, either here or below." Matson Nav. Co. v. United States, 284 U.S. 352, 359.

The Tucker Act empowers the district court only to award damages, but not to grant injunctive or declaratory relief. Richardson v. Morris, 409 U.S. 464; United States v. King, 395 U.S. 1; United States v. Sherwood, 312 U.S. 584, 589-591.[7] Since the statute would not authorize the district court to enjoin the enforcement of the customs laws, it follows that (1) the three-judge court was improperly convened[8] and (2) this Court has no jurisdiction to hear the appeal from that court's refusal to grant injunctive relief based on appellants' constitutional claims. See Moody v. Flowers, 387 U.S. 97, 104.[9]

7/ The declaratory and injunctive relief granted here was not merely incidental or ancillary to vindication of appellants' claims for damages, on which the court has not acted. See Clay v. United States, 210 F.2d 686 (C.A.D.C.), certiorari denied, 347 U.S. 927; cf. 28 U.S.C. (Supp. II) 1491.

8/ The three-judge court statute (28 U.S.C. 2282) provides only a mode of procedure and is not a grant of jurisdiction. Accordingly, if the complaint states no jurisdictional basis for injunctive relief (even if an action for damages might lie under the Tucker Act), there would be no grounds for convening a three-judge district court. See Lewis v. Texas Power & Light Co., 462 F. 2d 1318, 1320 (C.A. 5); Non-resident Taxpayers Ass'n v. Municipality of Philadelphia, 341 F. Supp. 1135 (D. N.J.), affirmed, 406 U.S. 951; cf. Alexander v. v. Americans United, Inc., 416 U.S. 752, 758.

9/ There is an additional reason to question whether the three-judge court was properly convened. Because the injunction and declaratory relief granted by the three-judge court rested upon a non-constitutional ground, i.e., construction of the statutes in issue, that relief, if otherwise appropriate, could and should have been granted by a single judge. See Hagans v. Lavine, 415 U.S. 528, 543-545. While the court's construction of the statutes did not wholly obviate the need to consider appellants' constitutional claims, the constitutional issues remaining (i.e., those pressed in this Court) are not substantial, as we show below (see pp. 6-8, infra), and so would themselves not have required that a three-judge court then be convened. Cf. Hagans v. Lavine, supra, 415 U.S. at 536-539. A three-judge court was not required here by

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Although the government believes that none of the other bases upon which the appellants invoked the jurisdiction of the district court was sufficient to authorize the court to grant injunctive relief, the district court did not pass upon them. Accordingly, it would be appropriate for this Court to vacate the judgment of the district court and to remand the case to that court to consider the other statutory provisions which appellants relied on as conferring jurisdiction over this action. Cf. Richardson v. Morris, supra.

2. Appellants' constitutional contentions are insubstantial so that, if the Court reaches them, there is no occasion to give them plenary consideration.

(a) Appellants have not been denied the opportunity for a hearing to determine whether penalties were properly imposed against them under 19 U.S.C. 1460. Appellants elected to follow the statutory procedure of making a deposit toward the penalties and then seeking their remission and mitigation, as a result of which all but $25 of Rich's penalty and all of Lee's penalty was remitted.[10/] Appellants could have compelled the government to institute a forfeiture proceeding pursuant to 19 U.S.C. 1594, 1595a, 1604 and 1607-1609, at which the government would have been required to establish the basis for the penalties. To invoke that procedure, however, appellants would have been required by 19 U.S.C. 1608 to file a claim and post a $250 bond. Having decided to follow the simpler and cheaper procedure of seeking administrative remission and mitigation of penalties,

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10/ In view of this fact, Lee lacks standing to challenge the procedure under which the penalties are imposed, and any issue with respect to the penalty against him is moot.

formal hearing before a small portion of one of the penalties was not remitted.

Appellant Lee challenges the requirement that a $250 bond must be posted before the government can be required to institute forfeiture proceeding. As Judge Learned Hand held over 30 years ago in Colacicco v. United States, 143 F. 2d 410, 411-412 (C.A. 2), certiorari denied, 323 U.S. 762, however, Section 1608 is "clearly constitutional" and has been repeatedly sustained.[11] Cf. United States v. Kras, 409 U.S. 434. Moreover, in Colacicco the court was unwilling to consider a claim that the bond requirement impaired the ability of an indigent to challenge a forfeiture, where the claimant had not shown that he was unable to obtain leave to proceed in forma pauperis. See 28 U.S.C. 1915. No such showing has been made here.

(b) Appellants argue that the hearing provided under the forfeiture provisions of the customs law is inadequate. Their challenge to 19 U.S.C. 1615--which since 1890 (26 Stat. 140) has provided that a claimant of property in a forfeiture proceeding has the burden of proof once the government shows probable cause for the institution of the action--rests upon the misconception that forfeiture proceedings are "quasi-criminal" in nature (J.S. 13-14). But this Court held in One Lot Emerald Cut Stones v. United States, 409 U.S. 232, that the forfeiture provisions involved here are not subject to all the requirements of criminal proceedings. Moreover, in Calero-Toledo v. Pearson Yacht Leasing

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11/ The requirement of a $250 cost bond dates from at least 1844, at which time it was required if the value of the goods were less than $100. 5 Stat. 653.

with due process to impose upon the claimant of property subject to forfeiture the burden of proving grounds that might bar the forfeiture.[12] Id. at 689-690.

CONCLUSION

The judgment of the district court should be vacated and remanded for consideration of other asserted bases of jurisdiction. Alternatively, the judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

12/ A similar challenge to the burden of proof provisions of the forfeiture laws was rejected in Bramble v. Richardson, 498 F. 2d 968 (C.A. 1), certiorari denied, No. 74-280, December 16, 1974.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

Appellate Docket No. 73-7006

ORIGINAL COPY

JAMES P. LEE, JR. and
RONALD RICH,
Appellants

vs.

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District Director of
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for the District
of Vermont;
VERNON D. ACREE,
United States Commissioner
of Customs;
WILLIAM E. SIMON,
United States Secretary
of the Treasury; and
THE UNITED STATES OF
AMERICA,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

BRIEF IN OPPOSITION TO MOTION TO VACATE OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-7006

JAMES P. LEE, JR. and RONALD RICH, Appellants

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On Appeal from the United States District Court

for the District of Vermont

Brief In Opposition To Motion To Vacate Or Affirm

Pursuant to Rule 16(d) of the Rules of the Supreme Court, Appellants submit this brief in opposition to Appellees' motion to vacate or affirm.

I. INTRODUCTION

Appellees have submitted a motion to vacate or affirm the judgment below alleging that the Court below erroneously predicated jurisdiction on 28 U.S.C. § 1346(a)(2)(The Tucker Act) and that no substantial issues warranting plenary consideration are before this Court. Because appellees have not appealed the judgment below and, therefore, the jurisdiction of the Court below was not treated in appellants' jurisdictional

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II. APPELLEES' MOTION TO VACATE SHOULD BE DENIED

Appellants, James P. Lee and Ronald Rich, were both subjected to civil penalties pursuant to 19 U.S.C. § 1460 for allegedly crossing into the United States from Canada while operating a motor vehicle without reporting for inspection. The civil penalty assessed against appellant Rich was mitigated to $25.00 and paid. The civil penalty assessed against appellant James Lee was mitigated in full.

The vehicle operated by James P. Lee was also subjected to forfeiture pursuant to 19 U.S.C. § 1595(a) and 21 U.S.C. § 881 since it was allegedly carrying contraband. The vehicle was seized and finally returned after Appellant Lee filed a petition for mitigation and remission and paid the remitted penalty of $100.

Appellants brought an action in the United States District Court for the District of Vermont seeking damages, including the return of the penalties they had paid, and an injunction against enforcement of certain provisions of the United States Customs laws.[1/] Jurisdiction was predicated

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1/ The complaint in Civ. No. 6451, Lee v. Thornton et al. requested that:

> "This court issue its writ in the nature of mandamus ordering defendants to restore to plaintiff the one hundred dollars ($100) penalty assessed against and paid by him.
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> This court award to plaintiff the amount of Two Thousand Dollars ($2000) to compensate him for damages incurred by defendants' actions.
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> This court issue its declaratory judgment holding that the provisions of 19 U.S.C. § 1460, 19 U.S.C. § 1595a, 21 U.S.C. § 881 which provide for seizures and forfeitures

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>
> This court issue its declaratory judgment holding that the provisions of 19 U.S.C. § 1618 which allow defendant Connelly, defendant Ambrose or defendant Thornton to assess forfeitures and penalties without affording constitutional safeguards to be unconstitutional and without force or effect, and enjoining the further enforcement

on 28 U.S.C. §§ 1331, 1337, 1346(a)(2), and 1361. Since, as part of their prayer for relief, appellants sought an injunction against the enforcement of an Act of Congress on constitutional grounds, a three-judge District Court was convened.

Jurisdiction over appellant's claim for damages is clearly given by the Tucker Act, 28 U.S.C. § 1346(a)(2). See United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972); Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3d Cir. 1972); Bramble v. Kleindienst, 357 F. Supp. 1028 (D. Colo. 1973), aff'd sub nom., 498 F.2d 968 (10th Cir. 1974); Melendez v. Schultz, 356 F. Supp. 1205 (D. Mass. 1973); Jaekel v. United States, 304 F. Supp. 993, 997 (S.D.N.Y. 1969).[2]

Equitable relief may be granted in a Tucker Act case incidental to a claim for money damages. See, e.g., Clay v. United States, 210 F.2d 686 (D.C. Cir. 1953); Blanc v. United States, 244 F.2d 708 (2d Cir. 1957). Additionally, under the broad principles of pendent jurisdiction enunciated by this Court, the request for injunctive relief made by appellants can be adjudicated pendent to the claim for damages. Cf. Hagans v. Lavine, 415 U.S. 528 (1974). This appears to be the common sense approach taken by a number of courts in similar cases. See Bramble v. Kleindienst, 357 F. Supp. 1028

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The complaint requested a three-judge district court on the basis of the constitutional challenge asserted in the last two paragraphs of the prayer for relief.

The prayer for relief in Civ. No. 6762, Rich v. Thornton et al. was similar.

2/ Appellees assert that they contested the jurisdiction of the District Court. Motion to Vacate or Affirm at 5 n. 6. In fact, their sole challenge to jurisdiction on 28 U.S.C. § 1346(a)(2) was based on the alleged failure of Appellants to exhaust administrative remedies. See Defendant's Supplemental Memorandum of Law at 3-4. (Record, Doc. No. 26, Lee v. Thornton et al - Civ. No. 6451). While this Court may vacate for obvious jurisdictional errors without argument, see Richardson v. Morris, 409 U.S. 464 (1973), appellees are in the anomalous position of asserting that an obvious jurisdictional defect is present even though they never raised the defect below.

(D. Colo. 1973), aff'd sub nom., 498 F.2d 968 (10th Cir. 1974); Melendez v. Shultz, 356 F. Supp. 1205 (D. Mass. 1973).[3/]

The precedent relied upon by appellees is inapplicable since the cases involved only requests for declaratory or injunctive relief. See Richardson v. Morris, 409 U.S. 464 (1973); United States v. King, 395 U.S. 1 (1969).

For these reasons, appellees' motion to vacate should be denied.[4/]

III. THE MOTION TO AFFIRM SHOULD BE DENIED

Appellees' have argued that the judgment below should be affirmed on three grounds: (1) having paid remitted and mitigated penalties, appellants may not challenge alternative procedures; (2) the cost bond requirement of 19 U.S.C. § 1608 is clearly valid; and (3) this Court has ruled in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) that the imposition of the burden of proof upon the claimant in forfeiture proceedings is constitutionally valid. Appellants believe that none of these grounds have merit and the motion to affirm should be denied.

Appellees postured their first argument below as attack on appellants' standing based on failure to exhaust administrative remedies.[5/] The three judge court rejected the argument:

3/ Even if jurisdiction can not be predicated on the Tucker Act, the lower court clearly had jurisdiction under 28 U.S.C. § 1337 (acts regulating commerce) and 28 U.S.C. § 1361 (mandamus).

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3/ Even if jurisdiction can not be predicated on the Tucker Act, the lower court clearly had jurisdiction under 28 U.S.C. § 1337 (acts regulating commerce) and 28 U.S.C. § 1361 (mandamus).

4/ As an additional ground for asserting that the three judge court was improperly convened, appellees have asserted that the constitutional claims before this Court and the three-judge court are insubstantial. The claims are clearly not frivolous or absolutely devoid of merit. Compare Hagans v. Lavine, 415 U.S. 528 (1974). Thus, this argument is relevant only to the motion to affirm.

5/ This argument properly applies only to Appellant James Lee, who could have obtained a hearing under 19 U.S.C. § 1608 if he were able to afford the substantial cost bond. Appellant Ronald Rich could not obtain a hearing under 19 U.S.C. § 1608 or any other provision since he was assessed only a personal penalty and his vehicle was not forfeited.

> It would serve no purpose to require plaintiffs to exhaust remedies "the alleged inadequacy and untimeliness of which are cornerstones ... "of their claims. [Melendez v. Shultz, 356 F. Supp. 1205, 1208 (D. Mass. 1973)]. Cf. Gibson v. Berryhill, 411 U.S. 564 (1973). See also Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233, 241-43 (1968) (Harlan J., concurring). We do not regard the payments of the respective fines as mooting the otherwise substantial constitutional claims asserted by plaintiffs. Cf. Ward v. Love County, 253 U.S. 17 (1920).

Lee v. Thornton, 370 F. Supp. 312, 317 (D. Vt. 1974). In essence, appellees are asking that appellants pursue a remedy that is wholly unavailable to them or to suffer loss of their motor vehicles while they pursue this action.

Appellees' second argument is based upon Colacicco v. United States, 143 F.2d 410 (2d Cir. 1944), a case involving a challenge to the bond requirement before this Court. In Colacicco, however, the plaintiff was financially able to post the required bond and the court noted:

> [W]e reserve the point whether a claimant, who makes out a prima facie case against the forfeiture, and is financially unable to post a bond, will be absolved from that necessity.

In this case, it has been stipulated that "[Lee] was unable to post a penal bond in the amount of $250.00 required to prevent a forfeiture sale". Ammended Stipulation at 5 (Record, Doc. No. 25, Lee v. Thornton - Civ. No. 6451). Appellants reitirate their position that, as applied to an indigent, the cost bond requirement is irrational. See Lindsey v. Normet, 405 U.S. 56, 78 (1972).

Finally, appellees have argued that the constitutional validity of imposing the burden of proof on the claimant in forfeiture proceedings has been determined in Calero-

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> v. Berryhill, 411 U.S. 564 (1973). See also Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233, 241-43 (1968) (Harlan J., concurring). We do not regard the payments of the respective fines as mooting the otherwise substantial constitutional claims asserted by plaintiffs. Cf. Ward v. Love County, 253 U.S. 17 (1920).

Lee v. Thornton, 370 F. Supp. 312, 317 (D. Vt. 1974). In essence, appellees are asking that appellants pursue a remedy that is wholly unavailable to them or to suffer loss of their motor vehicles while they pursue this action.

Appellees' second argument is based upon Colacicco v. United States, 143 F.2d 410 (2d Cir. 1944), a case involving a challenge to the bond requirement before this Court. In Colacicco, however, the plaintiff was financially able to post the required bond and the court noted:

> [W]e reserve the point whether a claimant, who makes out a prima facie case against the forfeiture, and is financially unable to post a bond, will be absolved from that necessity.

In this case, it has been stipulated that "[Lee] was unable to post a penal bond in the amount of $250.00 required to prevent a forfeiture sale". Ammended Stipulation at 5 (Record, Doc. No. 25, Lee v. Thornton - Civ. No. 6451). Appellants reitirate their position that, as applied to an indigent, the cost bond requirement is irrational. See Lindsey v. Normet, 405 U.S. 56, 78 (1972).

Finally, appellees have argued that the constitutional validity of imposing the burden of proof on the claimant in forfeiture proceedings has been determined in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

That case involved two narrow issues - (1) whether due process of law required a hearing prior to seizure pursuant to a forfeiture statute and (2) whether the seizure of property of an innocent owner-bailor was a "taking" under the Fifth and Fourteenth Ammendments. Neither holding is dispositive of the issues raised in this case.

Appellant Lee challenges the availability and content of the post-seizure hearing afforded pursuant to 19 U.S.C. § 1608 et seq. Appellant Lee asserts that the grounds necessary for seizure were not present since he was proceeding to a border check point. While the opinion in Calero-Toledo may suggest that the innocent owner of a vehicle or vessel admittedly involved in a crime has the burden of showing diligence in preventing unlawful use, it does not suggest that a person denying involvement of the vessel or vehicle in an offense has the burden of showing total innocence. Further, Calero-Toledo deals only with the relative burdens in a court challenge on constitutional grounds and not with the relative burdens in a statutory (and constitutionally mandated) post-seizure hearing. Finally, the defense raised by the bailor in Calero-Toledo does not threaten the right against self-incrimination as a requirement that the appellants go forward would do in this case. Compare Iannelli v. Long, 333 F. Supp. 407 (W.D. Pa. 1971).

IV. CONCLUSION

Appellees' motion to vacate or, in the alternative, affirm should be denied and the case set for plenary

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IV. CONCLUSION

Appellees' motion to vacate or, in the alternative, affirm should be denied and the case set for plenary consideration.

Respectfully submitted,

Dated: Jan 2, 1975

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LEE ET AL. v. THORNTON, DISTRICT DIRECTOR, UNITED STATES CUSTOMS FOR VERMONT, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

No. 73-7006. Decided February 18, 1975

The district courts' jurisdiction under Tucker Act over "any civil action or claim against the United States . . . founded either upon the Constitution or any Act of Congress," did not give District Court here jurisdiction over appellants' claims to enjoin enforcement of certain challenged provisions of the customs laws, since the Tucker Act empowers a district court only to award damages. Therefore, a three-judge court was improperly convened, and this Court has no jurisdiction over the appeal based on the District Court's refusal to grant injunctive relief founded on certain constitutional claims.

Vacated and remanded.

PER CURIAM.

Appellants brought actions in the District Court for the District of Vermont that challenged the constitutionality, facially and as applied, of various provisions of the customs laws, 46 Stat. 717 and 757, as amended, 19 U. S. C. §§ 1460 and 1618, that mandate procedures to effect forfeiture and remission or mitigation of penalties imposed after border patrol agents apprehended them and seized their vehicles when they crossed the border from Canada without passing through a customs station. The complaints sought (1) declaratory judgments that the challenged provisions were unconstitutional, (2) injunctions against their enforcement, (3) mandamus relief requiring the return of moneys paid as mitigated forfeitures or penalties based on violations of the customs laws, and (4) damages. A three-judge court was convened. The court held that it had jurisdic-

tion under the Tucker Act, 28 U. S. C. § 1346 (a)(2), rejected appellants' constitutional claims, enjoined appellees from applying the customs laws except as construed by the court, declined to remit appellants' fines, and returned to the single-judge District Court the question of damages.

The District Court held that it had jurisdiction of the complaints under the Tucker Act, and did not address other alternative bases of jurisdiction asserted in the complaints. The jurisdiction of the district courts under the Tucker Act over "[a]ny . . . civil action or claim against the United States . . . founded either upon the Constitution, or any Act of Congress . . ." does not include jurisdiction over appellants' claims to enjoin enforcement of the challenged provisions of the customs laws. The Tucker Act empowers district courts to award damages but not to grant injunctive or declaratory relief. *Richardson* v. *Morris*, 409 U. S. 464 (1973); *United States* v. *King*, 395 U. S. 1 (1969); *United States* v. *Sherwood*, 312 U. S. 584, 589–591 (1941). It follows that the three-judge court was improperly convened, and this Court therefore has no jurisdiction to entertain the appeal based on the District Court's refusal to grant injunctive relief founded on appellants' additional constitutional claims. Appellants' motion for leave to proceed *in forma pauperis* is granted, the judgment of the District Court is vacated, and the case is remanded for consideration of appellants' other asserted bases of jurisdiction.

So ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.